Supreme Court, U.S.
FILED

(1)

021257 FEB 24 2003

No. OFFICE OF THE CLERK

In the
Supreme Court of the United States

ERNEST T. SMITH, III, ET AL.,
Petitioners,

v.

THE NEW HAMPSHIRE DEPARTMENT OF
REVENUE ADMINISTRATION, ET AL.,
Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE STATE OF NEW HAMPSHIRE SUPREME COURT**

PETITION FOR WRIT OF CERTIORARI

MICHAEL C. HARVELL, ESQ.
Counsel of Record
ELIZABETH A. BAILEY, ESQ.
SHEEHAN PHINNEY BASS
+ GREEN, P.A.
1000 ELM STREET
P.O. BOX 3701
MANCHESTER, N.H. 03105-3701
(603) 668-0300

WILBUR A. GLAHN, III, ESQ.
ANDREA L. DALY, ESQ.
MCLANE, GRAF, RAULERSON
& MIDDLETON
900 ELM STREET
P.O. BOX 326
MANCHESTER, N.H. 03105
(603) 625-6464

Counsel continued on inside cover

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

294 PP
efh

RUSSELL F. HILLIARD, ESQ.
UPTON & HATFIELD, LLP
10 CENTRE STREET
CONCORD, N.H. 03301
(603) 224-7791

W. WRIGHT DANENBARGER, ESQ.
WIGGIN & NOURIE, P.A.
20 MARKET STREET
MANCHESTER, N.H. 03101
(603) 669-2211

WILLIAM F.J. ARDINGER, ESQ.
CHRISTOPHER J. SULLIVAN, ESQ.
RATH, YOUNG & PIGNATELLI, P.A.
ONE CAPITAL PLAZA
CONCORD, N.H. 03301
(603) 226-2600

DAVID E. BARRADALE, ESQ.
ANSELL BARRADALE NEWKIRK
ANDERSON & DWYER, P.A.
40 SOUTH RIVER ROAD
BEDFORD PLACE, UNIT 32
BEDFORD, N.H. 03110
(603) 664-8211

Counsel for Petitioners

QUESTIONS PRESENTED

1. In a Commerce Clause challenge to a state tax with express exemptions for investments in certain local enterprises, must taxpayers demonstrate, as a threshold matter, that the alleged discriminatory exemptions "caused" investment in the favored local enterprises that otherwise would have occurred in the non-favored enterprises?

2. If the Smith court correctly required that taxpayers have the burden of proving, as a threshold matter, that preferred local enterprises compete with non-favored enterprises, did the Smith court err by applying a rigorous standard to determine the existence of competition between favored and non-favored enterprises?

PARTIES TO THE PROCEEDING

Petitioners

Petitioners, who have been certified as a class, are New Hampshire taxpayers who paid an interest and dividend tax under N.H. Rev. Stat. Ann. § 77:1 et seq. for any of the tax years 1991 through 1994 and who have timely filed and properly preserved their refund claims with the New Hampshire Department of Revenue Administration under applicable New Hampshire law. Petitioners ("the Class") have no corporate affiliations. Petitioners were the plaintiffs in the Merrimack County Superior Court ("the trial court") and appellants in the New Hampshire Supreme Court.

Respondents

Respondents are the Department of Revenue Administration of the State of New Hampshire and its former Commissioner Stanley R. Arnold, Jr. (collectively referred to as "the State"). The State was the defendant in the trial court and the appellee before the New Hampshire Supreme Court.

TABLE OF CONTENTS

Questions Presented i

Parties To The Proceeding ii

Table Of Contents iii

Table Of Authorities vii

Opinions Below 1

Statement of Jurisdiction 1

Constitutional And Statutory Provisions Involved 1

Statement of the Case 3

Argument For Allowing The Writ 10

I. Review is Necessary Because the Smith II Decision Conflicts With Well-Established Commerce Clause Decisions of This Court 12

A. The Smith II Decision Proposes a New Commerce Clause Standard that Plaintiffs Must Demonstrate that Discriminatory Tax Schemes "Cause" an Actual Effect on Economic Decisions in the Capital Markets, and that New Standard Conflicts With Boston Stock Exchange and Fulton 12

B. Review should be granted to correct the State Court's misinterpretation of General Motors Corp. v. Tracy 16

C. Review is Important and Necessary to Clarify That Smith Does Not Portend a Safe Harbor for a New Era of Discriminatory State Taxes 18

II. Review should be granted in order to correct Smith II's departure from settled precedent concerning the level of proof needed to show discriminatory effect 20

Conclusion 24

Appendix

Appendix A
Opinion of the New Hampshire Supreme Court dated November 25, 2002 . . . . 1a

Appendix B
Order of the Merrimack County Superior Court dated August 10, 2000 . . . . 18a

Appendix C
Opinion of the New Hampshire Supreme Court dated April 3, 1997 . . . . 44a

Appendix D
Order of the Merrimack County Superior Court dated March 4, 1999 . . . . 71a

Appendix E
Plaintiffs' Requests for Findings of Fact and Rulings of Law 98a

Appendix F
Defendants' Requests for Findings of Fact and Rulings of Law 171a

Appendix G
Plaintiffs' Motion For Reconsideration dated August 21, 2000 . . . . 198a

Appendix H
Order Of The Merrimack County Superior Court dated September 25, 2000 . . . . 210a

Appendix I
Stipulation Regarding Certification Of Class Action And Dismissal Of Certain Claims dated November 25, 1998 . . . . 212a

Appendix J
Notice of Decision of Merrimack County Superior Court dated December 11, 1998 regarding Order of Merrimack County Superior Court dated December 3, 1998 . . . . 219a

Appendix K
N.H. Rev. Stat. Ann. § 77:4 (1991) 221a

Appendix L
Plaintiffs' Notice Of Appeal to the New Hampshire Supreme Court dated October 25, 2000 . . . . 224a

Appendix M
Plaintiffs' Amended Notice of Appeal to the New Hampshire Supreme Court dated December 20, 2001 . . . . 240a

TABLE OF AUTHORITIES

CASES

Armco Inc. v. Hardesty,
467 U.S. 638 (1984) 16

Associated Industries of Mo. v. Lohman,
511 U.S. 641 (1994) 15, 21

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984) 5, 11, 19, 20, 23

Boston Stock Exchange v. State Tax Com'n,
429 U.S. 318 (1977) . . . . Passim

Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine,
520 U.S. 564 (1997) 19

Fulton Corp. v. Faulkner,
516 U.S. 325 (1996) . . . . Passim

General Motors Corp. v. Tracy,
519 U.S. 278 (1997) . . . . Passim

Maryland v. Louisiana,
451 U.S. 725 (1981) 15, 16

Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon,
511 U.S. 93 (1994) 15

Philadelphia v. New Jersey,
437 U.S. 617 (1978) 15

Smith v. N.H. Dep't of Revenue Admin.,
692 A.2d 486 (1997) . . . . Passim

Smith v. N.H. Dep't of Revenue Admin.,
813 A.2d 372 (2001) . . . . Passim

STATUTES, CONSTITUTIONAL PROVISIONS AND TREATISES

28 U.S.C. §1257 1

N.H. Rev. Stat. Ann. § 77 . . . . Passim

1995 N.H. Laws Ch. 188 3

U.S. CONST. Art. I, §8, cl. 3 1

HELLERSTEIN JEROME R., & WALTER HELLERSTEIN,
STATE TAXATION, § 4.13 n.257 (3d ed. 2002) 10

Phillip M. Tatarowicz & Rebecca F. Mims-Verlande,
An Analytical Approach to State Tax Discrimination Under the Commerce Clause, 39 VAND L. REV. 879,
900 (1986) 21

OPINIONS BELOW

This case was the subject of an interlocutory transfer from the trial court without ruling to the New Hampshire Supreme Court, and subsequently remanded pursuant to the New Hampshire Supreme Court's first opinion, 692 A.2d 486 (1997) ("Smith I"). Following a trial on remand and the trial court's August 10, 2000 order, the Class appealed to the New Hampshire Supreme Court resulting in that Court's November 25, 2002 opinion, 813 A.2d 372 ("Smith II"). Smith II is included in Appendix A at 1a-17a. The trial court's August 10, 2000 Order is unpublished and included in the Appendix at Appendix B, 18a-43a. Smith I is included in Appendix C, 44a-70a.

STATEMENT OF JURISDICTION

The New Hampshire Supreme Court issued its Smith II opinion on November 25, 2002. This Petition for Writ of Certiorari is filed within 90 days of the Smith II opinion. The Class invokes this Court's jurisdiction pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides:

> "The Congress shall have Power....To regulate commerce for foreign Nations, and among the several states, and with the Indian Tribes...."

U.S. CONST. ~~Art. I,~~ § 8, cl. 3.

N.H. Rev. Stat. Ann. § 77:4, entitled "What Taxable," provides:

> Income of the following described classes is taxable:
>
> I. Interest from bonds, notes, money at interest, and from all debts due the person to be taxed, except interest from notes or bonds of this state, deposits in any credit union, savings bank, building and loan association, or savings department of any loan and trust company or national bank in this state or in those of any state which exempts from taxation the principal or income of deposits in such institutions in this state owned by residents of that state and notes or bonds of any political subdivision of this state. [Amended 1983, 405:1. 1985, 164:1, eff. July 26, 1985.]
>
> II. Dividends, other than stock dividends paid in new stock of the company issuing the same, on shares in all corporations and joint stock companies organized under the laws of any state, territory, or nation except New Hampshire state banks, trust companies, building and loan associations, credit unions, or national banks. [Amended 1983, 405:1, eff. Jan. 30, 1985.]

STATEMENT OF THE CASE

A. Background

The cornerstone of this case is facially discriminatory taxation by the State of New Hampshire in violation of the Commerce Clause of the United States Constitution. During the years at issue (1991 through 1994), New Hampshire law (N.H. Rev. Stat. Ann. § 77) imposed a five percent tax on all interest and dividends received on investments made by individuals, trusts, estates and certain partnerships, but expressly exempted from this tax interest and dividends received on investments in New Hampshire banks. N.H. Rev. Stat. Ann. § 77:4, I and II.[1] These exemptions produced an express statutory preference in favor of domestic economic interests (i.e., New Hampshire banks) seeking to raise capital from New Hampshire residents.

Under this express preferential scheme, if residents invested in interest-bearing investments issued by New Hampshire banks, the interest they received was exempt from New Hampshire's interest and dividends tax. If these residents invested instead in interest-bearing investments issued by interstate enterprises, the interest they received was subject to the tax.

Similarly, when residents invested in stock issued by New Hampshire banks, the dividends they received were tax-exempt, whereas dividends received on investments in stock issued by interstate enterprises were subject to tax.

---

[1] The exemptions related to New Hampshire banks were repealed, effective for taxable years beginning on or after January 1, 1995. 1995 N.H. Laws ch. 188.

B. The Proceedings Below

In Smith I, the State conceded, and the New Hampshire Supreme Court held, that this statutory scheme discriminated against interstate commerce in violation of the Commerce Clause. The New Hampshire Supreme Court ruled that these exemptions "*facially discriminate against interstate commerce* because interest and dividend income earned on investments in out-of-state banks is taxed while interest and dividend income earned on investments in New Hampshire banks remains untaxed." Smith I, 692 A.2d at 497 (emphasis added). The Court declined to invalidate the entire tax. Instead, relying on this Court's decision in General Motors Corp. v. Tracy, 519 U.S. 278 (1997) the Smith I court remanded the case to the trial court for a trial on one issue: "In order to determine the extent of the discrimination in this case, the trial court must make a factual determination of whether New Hampshire bank interest and dividends compete with other sources of investment income such as stock dividends and bond interest." Smith I, 692 A.2d at 497.

This determination was necessary, the New Hampshire Supreme Court concluded, to evaluate whether the discrimination found in Smith I applied beyond the discrimination conceded by the State and held to violate the Federal Constitution in Smith I. The New Hampshire Supreme Court reasoned that if "New Hampshire bank interest and dividends do not compete with other corporate investments, then the Federal Constitution has not been violated as to entities other than out-of-state banks." Id. However, the New Hampshire Supreme Court also held that if the Plaintiffs proved that New Hampshire bank interest and dividends "competed" with other sources of investment income, the Plaintiffs would have shown an effect on interstate commerce and that the facial discrimination extends "to other sources of interest or dividend income." Id. The

Smith I Court gave no guidance for assessing or evaluating competition.

During the Smith I proceedings, at trial and on appeal, the Class consistently contended that well-established Commerce Clause precedent required the conclusion that the express and facial statutory preference for investments issued by New Hampshire banks unlawfully discriminated against all enterprises seeking to raise capital from New Hampshire residents, without the need for proving competition. The Class raised this issue, set forth in Question 1 supra, both in its Requests for Rulings of Law with the trial court and in its original and amended notices of appeal to the New Hampshire Supreme Court. Appendix E, Plaintiffs' Requests for Ruling of Law ("PRL") PRL D, G, J at 132-134a, all denied by the trial court at 43a and Appendices L and M, Notices of Appeal, Question 4, at 232a and 250a. It also took the position that, even if "competition" between the favored local investments and foreign investments must be proved as a threshold matter, such proof would be satisfied by showing "some competition" between the local and foreign investments, in reliance on the decisions of this Court in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318 (1977), and Fulton Corp. v. Faulkner, 516 U.S. 325 (1996). The Class raised this issue, set forth in Question 2 supra, both in its Requests for Rulings of Law with the trial court and in its original and amended notices of appeal to the New Hampshire Supreme Court. Appendix E, PRL H, I, J, at 134a, denied by the trial court at 43a and Appendices L and M, Notices of Appeal, Question 3, at 232a and 249a.

At trial, the Class satisfied this standard by proving, by both expert and non-expert testimony, that financial investments issued by banks were in competition with other corporate investments by establishing that: (1) all of these investments had been, and could be, evaluated by certain fundamental and common characteristics, namely, that these investments all provided financial returns to investors accompanied by common elements of risk, liquidity, and convenience; (2) regardless of type, banks and corporations issued investments to raise capital; (3) consumers or investors purchased investments based on their common elements and "rebalanced" portfolios based upon changes in return, risk, liquidity, or convenience; (4) New Hampshire investors in general, and the Class members in particular, had the full array of investments available to them through banks, corporations and financial intermediaries such as brokerage firms and financial planners; (5) recognized economic theory, relied upon by many sectors of the economy, including governmental and financial institutions, views all financial investments to be in competition; and (6) New Hampshire financial planners and financial intermediaries considered investments issued by banks to be in competition with a broad array of corporate investments.

The centerpiece of the State's case that non-bank investments were not similarly situated to New Hampshire bank investments was the testimony of Margaret Guerin-Calvert, an antitrust economist. Ms. Guerin-Calvert testified that the appropriate test for competition between bank and non-bank investments was to inquire whether a five percent increase in the price of a hypothetical bank investment with a monopoly would cause investors to flee the bank investment for the non-bank investment so as to make the price increase unprofitable. The trial court approved this model as an appropriate test for competition. Defendants' Request for Findings of Fact ("DFF") 54 and 55, granted by the trial court. Appendix F, 184a and Appendix B, 43a. The converse of this request, that the antitrust model was not the appropriate standard for competition, was denied by the trial court. Plaintiffs' Request for Findings of Fact ("PFF") 148. Appendix E, 131a. Alternatively, Ms. Guerin-Calvert's articulation of the standard for competition was whether the non-bank investments were "close substitutes" for the favored New Hampshire bank investments. The appropriateness of this standard was raised by the Class, in its appeal to the New Hampshire Supreme Court; the issue is not discussed in Smith II.

The antitrust model urged by Ms. Guerin-Calvert and adopted by the trial court, required a sophisticated statistical analysis of competition, utilizing hypothetical price assumptions and market research, T.6/29-32, and usually used by regulatory bodies such the Federal Trade Commission with expertise in antitrust economics. Id. at 122. In response, the Class' expert, a Professor of Finance, testified that proof of effect would be difficult to establish, given the small size of the effect in a global marketplace. Testimony of Dennis Logue, T2/17. Significantly, one of Ms. Guerin-Calvert's points was that the repeal of the exemption did not produce a shift in investment from bank to non-bank investments. Unfortunately for her analysis, and in confirmation of the Class' Expert Testimony, the after-tax effect of the repeal was below the 5%-10% price change which her model uses to determine if products are in competition. T.6/131.

Upon remand, after a six-day trial[2], the trial court issued its order (hereinafter "Order") holding: (1) that taxpayers who paid tax on interest and dividend-bearing investments issued by out-of-state banks are entitled to receive a refund as a remedy for the facial discrimination found by this Court in Smith I; and (2) that all other taxpayers are not entitled to a remedy of any kind. See generally Appendix B, 42a. The Class appealed the trial court's determination that all other taxpayers are not entitled to a remedy of any kind.

---

[2] The Class was certified on March 4, 1999 after remand but before the trial.

The issue of the appropriate legal standard of competition between favored local investments and foreign investments necessary to establish a federal Commerce Clause violation was squarely before the trial court, and the Class adduced ample evidence establishing competition for federal Commerce Clause purposes. As set forth in Appendix B, 18a-42a in the text of its opinion, the trial court erroneously adopted a standard for competition that required the class to demonstrate "actual effect" on investment decisions of New Hampshire residents or "demonstrable harm" to such residents or that exempt investments were "economic counterparts" to non-exempt investments.

The Class appealed this issue to the New Hampshire Supreme Court. See e.g. Brief of the Plaintiffs, dated January 31, 2002 at 22-34.

In its Smith II opinion, the New Hampshire Supreme Court confirmed its Smith I holding that, under Tracy, as a threshold matter, "the petitioners had to demonstrate that the exemptions caused investment in local bank products that otherwise would have occurred in non-bank products." 813 A. 2d at 378, Appendix A, 11a. Further, Smith II held that "the trial court used the correct legal standard to determine whether the exemptions discriminated against out-of-state non-bank investment sources...," Id., 813 A. 2d at 381, Appendix A, 17a, and the New Hampshire Supreme Court affirmed the trial court's Order.

Notwithstanding the parties' presentation of two differing evidentiary cases for competition, the Smith II Court declined to either recognize or discuss the appropriate standard by which the competition requirement created by Smith I was to be judged. It merely held that there was evidence to support the trial court's finding that non-bank sources of income did not compete with New Hampshire bank sources of income. Left undisturbed, therefore, was the trial court's use of a standard for competition which required a complex econometric analysis or proof of an effect on interstate commerce.

In Smith II, the New Hampshire Supreme Court affirmed the trial court's Order and in doing so expressly disagreed with the Class's assertion that the trial court employed an erroneous legal standard to determine whether out-of-state non-bank investment sources competed with in-state banks. 813 A. 2d at 378, Appendix A, 10a.

The Class now appeals the New Hampshire Supreme Court's opinions conflicting with well-established Commerce Clause precedent.

ARGUMENT FOR ALLOWING THE WRIT

The Smith II decision concludes that Tracy has dramatically altered this Court's existing Commerce Clause jurisprudence so that plaintiffs challenging facially discriminatory taxes must, as a threshold matter, prove that the challenged discrimination caused an actual effect on interstate economic decisions.

> "Pursuant to General Motors Corp., the [trial] court examined whether products from out-of-state non-banks were similarly situated to products from New Hampshire banks ... In other words, the petitioners had to demonstrate that the exemptions *caused* investment in local bank products that otherwise would have occurred in non-bank products."

Smith II, 813 A.2d. 378, Appendix A, 10a and 11a (emphasis added).

The implications of this holding are far-reaching:

> "The Smith case suggests that state taxing authorities will invoke General Motors [v. Tracy] to require taxpayers to demonstrate, as a threshold matter, that the alleged Commerce Clause discrimination in fact affects economic decision making in competitive markets."

HELLERSTEIN JEROME R., & WALTER HELLERSTEIN, STATE TAXATION, § 4.13 n. 257 (3d ed. 2002).

With this analysis, Professor Hellerstein prophesies that the Smith II decision will encourage states to enact protectionist, discriminatory tax schemes as they struggle to compete for jobs and capital in the global economy. The Smith II decision misapplies Tracy's regulated markets analysis in a manner that, if allowed to stand, will eviscerate well-established Commerce Clause precedent establishing a "virtually per se rule of invalidity" for facial discrimination cases.

This holding ignores settled precedent from this Court specifying that once a facial violation of the Commerce Clause is shown, effect need not be proven. Smith II compounded this egregious error by sustaining the trial court's adoption of a standard for competition between the favored local investment and interstate investments which would license state taxing authorities to make the kind of factual arguments now forbidden by Bacchus, Boston Stock Exchange, and Fulton.

This Court should grant this petition to protect clear and well-established Commerce Clause precedent so that Professor Hellerstein's prediction of a new era of discrimination does not become true.

I. Review is Necessary Because the Smith II Decision Conflicts With Well-Established Commerce Clause Decisions of This Court.

A. The Smith II Decision Proposes a New Commerce Clause Standard that Plaintiffs Must Demonstrate that Discriminatory Tax Schemes "Cause" an Actual Effect on Economic Decisions in the Capital Markets, and that New Standard Conflicts With Boston Stock Exchange and Fulton.

The Smith II decision violates well-established Commerce Clause precedent that states have no authority to enact facially discriminatory tax schemes that would tilt the capital markets to encourage investment transactions to favor domestic interests. New Hampshire's statute expressly exempted interest and dividends paid by in-state bank enterprises while taxing interest and dividends paid by interstate enterprises. The Smith II Court held that Tracy requires plaintiffs seeking to prove discriminatory effect to "demonstrate that the exemptions caused investment in local bank products that otherwise would have occurred in non-bank products." Smith, 813 A.2d. at 378, Appendix A, 11a. This required proof that a facially discriminatory tax scheme "caused" an actual effect on economic decisions within the capital markets conflicts with Boston Stock Exchange and Fulton.

In Boston Stock Exchange, this Court invalidated a New York transfer tax scheme that served simply "to extend a financial advantage" to transactions taking place at securities exchanges located in New York rather than at regional exchanges. Boston Stock Exchange, 429 U.S. at 331. As in this case, the lower court sought to save the discriminatory tax scheme by finding that "the higher tax on large out-of-state sales would have no 'practical' effect since 'it is more than likely ... that the sale would be made on a New York exchange in any event." Id. at 333 (citing 37 N.Y.2d 535, 543). This Court quickly dismissed this attempt to save the discriminatory tax:

> Even if we did not conclude that large-block sellers are likely to rely on economic rather than geographic factors in choosing an exchange, §270-a [the offending statute] would fall before the Commerce Clause. Whatever the current inclinations of New York investors, the Clause protects out-of-state businesses from *any discriminatory burden* on their interstate commercial activities.

Id. at 334, n. 13 (emphasis added).

Under the mandate in Smith II that taxpayers must prove that the facially discriminatory tax preference "caused" an actual effect in the capital markets, the regional stock exchanges in Boston Stock Exchange would have had to establish that New York's transfer tax preferences "caused" transactions to occur at the New York Stock Exchange that otherwise would have occurred at regional exchanges. Yet the Supreme Court reversed New York's attempts to justify the facially discriminatory scheme as having no "practical effect." Boston Stock Exchange, 429 U.S. at 333. Just as in Boston Stock Exchange, the Supreme Court should allow this petition in order to correct the Smith Court's attempt to justify the discriminatory tax scheme under a new "causation" standard.

In Fulton, the Supreme Court invalidated North Carolina's allowance of a deduction from its intangibles tax base determined solely by the amount of business activity that the entity issuing stock conducted within North Carolina. Fulton, 519 U.S. at 328. Again, this Court quickly dispensed with the State's attempt to defend this facially discriminatory scheme:

> There is no doubt that the intangibles tax facially discriminates against interstate commerce. A regime that taxes stock only to the degree that its issuing corporation participates in interstate commerce favors domestic corporations over their foreign competitors in raising capital among North Carolina residents and tends, at least, to discourage domestic corporations from plying their trades in interstate commerce.

Id. at 333.

Under the mandate in Smith that taxpayers must prove that the facially discriminatory tax preference "caused" an actual effect in the capital markets, the plaintiffs in Fulton would have had to establish that the intangibles tax deduction "caused" North Carolina residents to make investments in North Carolina-based companies that otherwise would have been made in interstate companies. Yet the Supreme Court reversed North Carolina's attempts to justify the discriminatory scheme because "the tax is so small in amount as to have no *practical impact* at all" (Id. at 333, n.3) (emphasis added). Just as in Fulton, the Supreme Court should allow this petition in order to correct the Smith II Court's attempt to justify the discriminatory tax scheme under a new "causation" standard.

In reversing the North Carolina Supreme Court, this Court in Fulton stated the well-established rule that one does not have to demonstrate the magnitude of discrimination, only that discrimination exists:

> Although the Secretary does suggest that the tax is so small in amount as to have no practical impact at all, we have never recognized a "de minimis" defense to a charge of discriminatory taxation under the Commerce Clause. See, e.g., Associated Industries of Mo. v. Lohman, 511 U.S. 641, 650, 114 S.Ct. 1815, 1822, 128 L.Ed.2d 639 (1994) ... ("[A]ctual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred"); Maryland v. Louisiana, 451 U.S. 725, 760, 101 S.Ct. 2114, 2135, 68 L.Ed.2d 576 (1981) ("We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates").

Id.

In contexts other than the financial markets, this Court has routinely rejected this "practical effect" or de minimis impact defense, by applying a "'virtually per se rule of invalidity' to provisions that patently discriminate against interstate trade." Associated Industries of Mo., 511 U.S. at 641, 647 (1994) (citing Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)); see also Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon, 511 U.S. 93, 99 (1994)("'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter"); Armco Inc. v. Hardesty, 467 U.S. 638, 644 (1984) ("Appellee suggests that we should require Armco to prove actual discriminatory impact on it by pointing to a State that imposes a manufacturing tax that results in a total burden higher than that imposed on Armco's competitors in West Virginia. This is not the test."); Maryland v. Louisiana, 451 U.S. at 760 ("We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.").

Similarly, New Hampshire's attempt to justify the facially discriminatory tax exemptions for certain local enterprises seeking capital must also fail. As in Boston Stock Exchange and Fulton, this Court should grant review to prevent another state's attempt to justify a facially discriminatory statute by mandating that plaintiffs must prove that the tax preference "caused" an actual effect on economic decisions.

B. Review should be granted to correct the State Court's misinterpretation of General Motors Corp. v. Tracy.

In Smith II, the Court relied on Tracy for the proposition that plaintiffs challenging facially discriminatory tax statutes must "demonstrate that the exemptions caused investment in local bank products that otherwise would have occurred in non-bank products." Smith II, 813 A.2d at 378, Appendix A, 11a It is precisely this inappropriate extension of Tracy's careful analysis of a local and regulated market case to the unregulated and national capital marketplace that has led Professor Hellerstein to predict a new flood of state tax discrimination.

Tracy addressed the special case of whether the exemption of sales of regulated or "bundled" natural gas products from an Ohio sales and use tax generally applicable to sellers of natural gas unlawfully discriminated against independent unregulated natural gas marketers. Tracy carefully examined the history and structure of natural gas regulation and found that the regulated utility's "bundled product reflects the demand of a market neither susceptible to competition by the interstate sellers nor likely to be served except by regulated natural monopolies that have historically supplied its needs." Tracy, 519 U.S. at 303. In Tracy, this Court decided to uphold the tax statute, openly recognizing "an obligation to proceed cautiously lest we imperil the delivery by regulated LDC's of bundled gas to the noncompetitive captive market." Tracy, 519 U.S. at 304.

The Smith I and II courts misapplied the Tracy opinion in two ways. First, they failed to recognize the careful efforts of this Court to circumscribe the scope of the Tracy decision to cases involving traditionally regulated markets. Stretching and bending Tracy to save New Hampshire's discriminatory tax, the Smith II court found that the "Supreme Court did not limit its holding to regulated markets." Smith II, 813 A.2d at 377, Appendix A, 8a. Second, it transformed Tracy's comparison of regulated and unregulated markets into a new "threshold" Commerce Clause standard requiring plaintiffs to prove that facially discriminatory tax preferences "caused" an actual impact on economic decisions. In Tracy, this Court noted that "when the allegedly competing entities provide different products, as here, there is a threshold question whether companies are indeed similarly situated for constitutional purposes." Tracy, 519 U.S. at 299; cited in Smith II, 813 A.2d at 377, Appendix A 8a. The Smith II court's extension of this common sense commentary on the special issues created by traditionally regulated markets into a pure capital markets context where issuers of interest and dividend-bearing investments compete for the capital of New Hampshire residents is wrong as a matter of law.

C. Review is Important and Necessary to Clarify That Smith Does Not Portend a Safe Harbor for a New Era of Discriminatory State Taxes.

Smith II's new threshold "cause" standard would require complex economic and market evidence and analysis in every Commerce Clause case. In Tracy, this Court acknowledged that courts are "institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them." Tracy, 519 U.S. at 308. Further, Tracy found that courts are "consequently ill qualified to develop Commerce Clause doctrine dependent upon any such predictive judgments, and it behooves us to be as reticent about projecting the effect of applying the Commerce Clause here, as we customarily are in declining to engage in elaborate analysis of real-world economic effects, ... or to consider subtle compensatory tax defenses." Tracy, 519 U.S. at 309 (citations omitted).

The Smith II decision flies directly in the face of this cautious jurisprudence, and essentially proposes a new threshold "causation" evidentiary requirement in Commerce Clause cases. As cited above, Professor Hellerstein's prediction contemplates a post-Smith II world where every plaintiff must be advised to advance complex economics and market evidence demonstrating that a facially discriminatory state tax actually "caused" an actual impact on economic decisions that burdened interstate commerce.

Requiring such comprehensive evidentiary obstacles to Commerce Clause challenges is inconsistent with this Court's precedent, and this Court's strong record of striking down discriminatory taxes under the "virtually per se invalid" rule. See Bacchus, 468 U.S. at 269 (the fact that tax-exempted liquors did not constitute a present "competitive threat" to other liquors was not dispositive of whether competition existed; the court need not know how unequal the tax is before concluding it unconstitutionally discriminates); Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine, 520 U.S. 564, 581, n. 15 (1997)(a particularized showing of the effects of the discrimination is not required to establish constitutionally impermissible discrimination).

Indeed, if Smith II is correct, then could Hawaii reconsider its old wholesale liquor tax, with its special exemption for locally-produced okolehoa brandy and pineapple wines? Interstate liquor wholesalers would object that the Supreme Court in Bacchus held that such a tax scheme unlawfully discriminated against interstate commerce. But in Professor Hellerstein's post-Smith II world, would not the Hawaii Supreme Court feel emboldened once again to uphold the scheme because plaintiffs could not meet their new threshold burden of proof that the local fruit wines posed a "competitive threat" to other liquors? The Smith II Court should not be allowed to open the door to this reinvention of established Commerce Clause precedent by its misapplication of Tracy.

Requiring such threshold economics and market proof in every Commerce Clause case would place courts in exactly the position of evaluating "real-world economic effects" Tracy counseled courts to avoid. Indeed, if the Smith II standard were to be sanctioned, it is likely that substantial discrimination against interstate commerce could be practiced by states because of difficulty of proof, particularly given the complexities of the capital markets. That is why this Court should grant review.

II. Review should be granted in order to correct Smith II's departure from settled precedent concerning the level of proof needed to show discriminatory effect.

To the extent Smith I correctly required a showing of competition between New Hampshire bank investments and non-bank investments, the Smith II court erred by imposing an unreasonably stringent standard for such competition in violation of existing U.S. Supreme Court authority.

In Bacchus, this Court set an appropriately low threshold for plaintiffs seeking to demonstrate the requisite level of competition sufficient to establish a Commerce Clause violation. Bacchus, 468 U.S. at 271. The Bacchus Court clearly held that a plaintiff satisfies its burden to prove discriminatory effect by demonstrating "some competition": "[A]s long as there is some competition between the locally produced exempt products and non-exempt products from outside the State, there is a discriminatory effect." Id. Use by the Supreme Court of the "some competition" standard was the appropriate standard in view of the importance of the values of the Commerce Clause reflected in the rule of per se invalidity followed in cases of facial discrimination. The Supreme Court, in its Commerce Clause decisions, has set forth legal parameters designed to dissuade States from enacting discriminatory schemes in violation of the Commerce Clause. The "some competition" standard articulated by the Bacchus court provides plaintiffs with an achievable burden of proof and is consistent with the Supreme Court's objective of enforcing the Commerce Clause by presumptions that favor establishment of discriminatory effect. See, e.g., Associated Industries of Mo., 511 U.S. at 647.[3]

The Class easily met this "some competition" burden of proof at trial by the evidence summarized at pp. 5-6, supra. Among other things, that evidence proved that New Hampshire bank investments were available in the same markets as interstate non-bank investments, that each were exchanged for the other as portfolio rebalancing occurred, that each shared common investment characteristics, and that they were viewed by New Hampshire investment professionals to be in competition with each other. Indeed, the trial court essentially found that "some competition" existed when it found that bank CDs and equities such as common stock, are substituted for each other in the course of routine portfolio reallocation and active money managers of investor portfolios routinely substitute cash equivalents for equities and vice versa in the course of reallocating investor portfolios. Appendix E, 108-109a, PFF, Requests 42-43, granted by the trial court.

The trial court expressly rejected the "some competition" standard (See Appendix E, 134a, PRL, Request I) and erroneously approved the unworkable antitrust model of competition urged by the State. Appendix E, 131a, PFF, Request 148 (trial court denied the Class' request for a finding that the antitrust model used by Ms. Guerin-Calvert was inappropriate to measure competition). In Smith II, the Court affirmed the trial court's faulty analysis and hence perpetuated an erroneous standard of competition that conflicts with the Bacchus decision.

---

[3] Although, to the knowledge of Petitioners, no court has adopted the standard, one commentator has suggested a "risk of discrimination" standard for proving discriminatory effect. Phillip M. Tatarowicz & Rebecca F. Mims-Verlande, An Analytical Approach to State Tax Discrimination Under the Commerce Clause, 39 VAND L. REV. 879, 900 (1986). In Petitioners' view, this is tantamount to the "some discrimination" standard, but may be more susceptible of definition.

The antitrust, economic counterparts, or impact on interstate commerce models approved by the Smith II court are unworkable to effectively protect interstate commerce against state protectionism in the capital markets. The complex econometric model urged by the State's antitrust expert and endorsed by the Trial Court through its denial of PFF 148 would allow states to discriminate between intrastate and interstate markets unless taxpayers could show that products in each market were 'close substitutes' for each other. The daunting obstacle of proving 'close substitutes' under the Federal Antitrust Guidelines approved by Smith II would itself help to insulate state discrimination against interstate commerce from attack under the Commerce Clause. If the trial court's standard were to be adopted, it is likely that substantial discrimination against interstate commerce could be practiced by states because of difficulty of proof. One striking example is the application of the State's urged Antitrust Guidelines to this case. Even as Ms. Guerin-Calvert claimed the repeal of the exemption showed no shift from New Hampshire bank products to interstate products, she was forced to admit that the after-tax effect of the repeal was below the price change radar screen of her model. T.6/131 Lastly, Justice Souter's analysis in Tracy of this Court's inability to engage in analysis of real-world economic effects, Tracy, 519 U.S. at 309, bolsters the conclusion that this Court should not endorse the Smith II approval or the Antitrust Guidelines as a standard for competition.

The same is true of Smith II's requirement to prove impact on commerce. Such a conclusion could be reached only after significant econometric evidence similar to that found wanting in the Class' case by the State's expert and difficult or impossible to establish, as the Class' expert testified, when the discriminatory effect is small. To condition a finding of discriminatory effect on such evidence is to prevent taxpayers from recovery for interstate commerce discrimination.

The Supreme Court should grant this Petition because the Smith court, in approving the unworkable antitrust model of competition, or the economic counterpart or actual impact standard, has set an incorrect burden of proof that conflicts with the "some competition" standard established by this Court in its Bacchus decision.

CONCLUSION

For these reasons, this Court should grant the Petitioners' Petition for Certiorari and decide these important questions concerning the federal Commerce Clause.

Respectfully Submitted:

MICHAEL C. HARVELL
Counsel of Record

Elizabeth A. Bailey
SHEEHAN PHINNEY BASS +
GREEN,
PROFESSIONAL ASSOCIATION
1000 Elm Street
P. O. Box 3701
Manchester, NH 03105-3701
(603) 627-8133

Attorneys for Petitioners

APPENDIX A

THE SUPREME COURT OF NEW HAMPSHIRE

No. 2000-682

[Argued: June 5, 2002]
[Opinion Issued: November 25, 2002]

ERNEST T. SMITH, III & a.)
)
v.)
)
NEW HAMPSHIRE DEPARTMENT)
OF REVENUE ADMINISTRATION & a.)
)

JUDGES:
DALIANIS, J. NADEAU and DUGGAN, JJ., concurred.

OPINION

DALIANIS, J. The petitioners, a class of similarly situated taxpayers, appeal the Superior Court's (McGuire, J.) ruling that they were not entitled to a refund of the New Hampshire interest and dividend tax (I&D tax) paid during the 1991 through 1994 tax years on interest and dividends from out-of-state non-bank investment sources. We affirm.

I. Relevant Facts

This case is before us again after remand. See Smith v. N.H. Dep't of Revenue Admin., 141 N.H. 681 (1997) (Smith I). We recite only a brief history of the facts necessary to decide this appeal.

The I&D tax was enacted in 1923. Until 1995, interest and dividends derived from investments in New Hampshire state banks, trust companies, building and loan associations, credit unions or national banks with a New Hampshire branch were exempt from the I&D tax. See RSA 77:4, I-II (1991) (amended 1995). The legislature repealed these exemptions in 1995. See Laws 1995, ch. 188.

The petitioners are a class of New Hampshire residents who paid I&D taxes on interest and dividends earned on out-of-state investments from 1991 through 1994. These out-of-state investments included: (1) the full range of bank deposits in out-of-state banks; (2) stock in out-of-state stock banks; (3) stock in out-of-state bank holding companies; (4) municipal, state and federal government bonds; (5) treasury bills; (6) corporate bonds; (7) publicly traded stock; and (8) cash equivalents, such as money management accounts, maintained by brokerages.

In 1995, the petitioners sued the respondents, the New Hampshire Department of Revenue Administration and its commissioner, claiming that the tax exemptions favored New Hampshire banks and thereby violated Part I, Article 12 and Part II, Articles 5 and 6 of the State Constitution and the Commerce and Equal Protection Clauses of the Federal

Constitution. The petitioners sought a full refund of all I&D taxes paid from 1991 through 1994. The Superior Court (Manias, J.) transferred without ruling several constitutional questions for our review, excluding any issues on remedy. We answered two of these questions in Smith I.

In Smith I, 141 N.H. at 688, we upheld the validity of the tax exemptions under the State Constitution. We held, however, that the legislature's "protectionist effort" in favor of domestic banks violated the Commerce Clause of the United States Constitution. Id. at 688, 695-96. Having determined that the exemptions discriminated on their face against out-of-state banks and, therefore, violated the Commerce Clause, we remanded for a determination as to whether the exemptions, in practice, also discriminated against out-of-state non-bank investment sources. See id. at 696.

Following a six-day merits hearing, the trial court determined that the petitioners failed to show that the exemptions, in practice, discriminated against out-of-state non-bank investment sources. Accordingly, the court ruled that they were entitled to only a partial refund of their I&D taxes, representing the I&D taxes they had paid on out-of-state bank investments. The court ruled that the petitioners were not entitled to a remedy regarding the I&D taxes paid on investment income from out-of-state non-bank sources. The petitioners appealed.

II. The Dormant Commerce Clause

In Smith I, we outlined a comprehensive framework of Commerce Clause jurisprudence, and need not repeat ourselves here. We do, however, revisit a few fundamental principles.

The Commerce Clause grants Congress the authority to "regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. This power includes a negative aspect, known as the dormant Commerce Clause, which prohibits States from unjustifiably discriminating against or burdening the interstate flow of articles of commerce. Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore., 511 U.S. 93, 98 (1994). The core purpose of the dormant Commerce Clause is to prohibit economic protectionism - "that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273-74 (1988). As related to state taxation, the dormant Commerce Clause precludes States from "impos[ing] a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business." Bacchus Imports, LTD v. Dias, 468 U.S. 263, 268 (1984) (quotations and ellipsis omitted).

The Supreme Court has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause. Brown-Forman Distillers v. N.Y. Liquor Auth., 476 U.S. 573, 578-79 (1986). "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [the Supreme Court has] generally struck down the statute without further inquiry." Id. at 579. Such a statute is "virtually per se invalid." Oregon Waste Systems, Inc., 511 U.S. at 99.

When, however, a statute only indirectly affects interstate commerce and regulates evenhandedly, the Supreme Court has "examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." Brown-Forman Distillers, 476 U.S. at 579; see Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Nondiscriminatory state regulations having only incidental effects on interstate commerce are valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike, 397 U.S. at 142.

"In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." Brown-Forman Distillers, 476 U.S. at 579.

In Smith I, 141 N.H. at 695, the respondents conceded, and we held that the exemptions at issue facially discriminated against out-of-state banks. The respondents also conceded that the discrimination did not advance a legitimate local purpose. Id. at 694. In light of these concessions, we remanded the question of whether the exemptions also discriminated against non-bank investment sources in their practical effect, thus entitling the petitioners to a full refund of the I&D taxes they paid on all out-of-state investments during the relevant years. Id. at 696-97.

III. Analysis

A. Standard of Review

On appeal, "[w]e will affirm the trial court's factual findings unless they are unsupported by the evidence, and will affirm the trial court's legal rulings unless they are erroneous as a matter of law." Morgenstern v. Town of Rye, 147 N.H. 558, 561 (2002) (citation omitted).

As an initial matter, we reject the petitioners' assertion that we must review the trial court's factual findings de novo because this appeal involves constitutional issues. "[N]o broader review is authorized here simply because this is a constitutional case, or because the factual findings at issue may determine the outcome of the case." Maine v. Taylor, 477 U.S. 131, 145 (1986); see Morgenstern, 147 N.H. at 561 (employing deferential review of trial court's findings in context of constitutional challenge). The empirical component of assessing the validity of a constitutional claim, like any other form of fact-finding, is the basic responsibility of the trial courts. Maine, 477 U.S. at 144-45. Our task on appeal "is not to decide whether we would have found differently but to determine whether a reasonable person could find as did the trial judge." Averill v. Dreher-Holloway, 134 N.H. 469, 472 (1991) (quotations omitted); accord Maine, 477 U.S. at 145.

B. Smith I

The petitioners first urge us to reconsider Smith I. They invite us to conclude, as a matter of law, that the tax exemptions at issue facially discriminated against all out-of-state investment sources, not just out-of-state banks. Even assuming that it would be procedurally appropriate for us to revisit Smith I in this appeal, we decline the petitioners' invitation to do so.

The petitioners particularly object to our remand instructions in Smith I, which required the trial court to "make a factual determination whether New Hampshire bank interest and dividends compete with other sources of investment income such as stock dividends and bond interest." Smith I, 141 N.H. at 696. They argue that the Commerce Clause does not require an analysis of whether the entities at issue compete against one another.

We take this opportunity to clarify why it was necessary for the trial court to analyze whether out-of-state non-bank investment sources and in-state banks compete in the same market in order to determine whether the exemptions discriminated against out-of-state non-bank investment sources.

"[A]ny notion of discrimination assumes a comparison of substantially similar entities." General Motors Corp. v. Tracy, 519 U.S. 278, 298 (1997). Entities are "substantially similar" or "similarly situated" for Commerce Clause purposes when they compete against one another in the same market. See id. at 299. In this case, the entities at issue, in-state banks and out-of-state non-bank investment sources, have different investment products. See Smith I, 141 N.H. at 690. As we explained in Smith I, "[b]anks are different." Id. at 689. They have "distinct characteristic powers, privileges, and responsibilities." Id. "Just as banks differ from other business institutions, bank deposits differ from other investments. Stock in a local 'stock bank' is a different sort of stock." Id. at 690.

"[W]hen the allegedly competing entities provide different products, as here, there is a threshold question whether the [entities] are indeed similarly situated for constitutional purposes." General Motors Corp., 519 U.S. at 299. "This is so for the simple reason that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed." Id. Thus, unless the entities compete against one another in a single market, "there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply." Id. at 300.

We find the petitioners' attempt to distinguish General Motors Corp. unpersuasive. The petitioners argue that General Motors Corp. applies only to regulated markets, such as the market for natural gas. The Supreme Court did not limit its holding to regulated markets, however. Moreover, the idea that discrimination under the Commerce Clause must involve entities that compete against one another is not a new one. See Alaska v. Arctic Maid, 366 U.S. 199, 204-05 (1961) (holding that claimants and cold storage facilities served separate markets, did not compete with one another, and thus were not similarly situated for Commerce Clause purposes); Bacchus Imports, LTD., 468 U.S. at 271 ("as long as there is some competition between the locally produced exempt products and nonexempt products from outside the State, there is a discriminatory effect"); Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 197 (1995) ("States are barred from discriminating against foreign enterprises competing with local businesses.").

The petitioners assert that because the Supreme Court did not analyze whether there was competition between domestic and foreign interests in a number of cases, no such analysis is required "in an unregulated markets case." We disagree.

In the cases upon which the petitioners rely, no competition analysis was required because the statutes at issue differentiated between obviously similarly situated entities. See South Central Bell Telephone Co. v. Alabama, 526 U.S. 160, 169-70 (1999) (franchise tax gave domestic corporations ability to reduce tax liability by reducing par value of stock, while denying foreign corporations the same ability); Fulton Corp. v. Faulkner, 516 U.S. 325, 328 (1996) (stock in corporation doing all of its business in-state entitled to 100% taxable percentage deduction, while stock in corporation doing all of its business out-of-state not entitled to any deduction); Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 330-32 (1977) (security transactions involving out-of-state sales taxed more heavily than those involving in-state sales).

C. Trial Court's Legal Rulings and Factual Findings

The petitioners next assert that the trial court employed an erroneous legal standard to determine whether out-of-state non-bank investment sources competed with in-state banks. We disagree.

Consistent with Supreme Court precedent and with the remand instructions in Smith I, the trial court first noted that the exemptions at issue discriminated on their face against out-of-state banks only. "By their very terms, the statutory exemptions at issue in this case economically protected New Hampshire banks. New Hampshire banks were advantaged to the disadvantage of out-of-state banks. The exemptions encouraged investment in New Hampshire banks by providing an economic benefit to investors in in-state banks which investors in out-of-state banks did not receive."

The court then examined whether other investment products, not subject to the facial discrimination, were discriminated against. Pursuant to General Motors Corp., the court examined whether products from out-of-state non-banks were similarly situated to products from New Hampshire banks, in that they competed against one another in the same market. We find no legal error in this standard.

The petitioners assert that the trial court, in effect, accepted the respondents' defense that the tax was so small that its effect on the marketplace was de minimis, and could not have constituted a constitutional violation. We do not share the petitioners' interpretation of the trial court's ruling. Nor do we agree with the petitioners that the trial court required them to quantify the extent of the alleged discrimination between the investment products of out-of-state non-banks and of New Hampshire banks.

We similarly reject the petitioners' argument that the legal standard the trial court employed is "ill-advised" because it requires "complex economics and market analysis in every Commerce Clause case." We do not speak to every Commerce Clause case, but conclude that, in this case, the petitioners' burden was not unduly difficult.

The petitioners needed to convince the trial court, by a preponderance of the evidence, that, absent the exemptions, local bank products and out-of-state non-bank products would have served the same market of investors. In other words, the petitioners had to demonstrate that the exemptions caused investment in local bank products that otherwise would have occurred in non-bank products.

Because the I&D tax exemptions had been repealed for approximately five years by the time the merits hearing occurred, the petitioners had a unique evidentiary opportunity. Unlike other cases in which a party can rely only upon the mere theoretical possibility that, absent the allegedly impermissible statute, entities producing different products would have competed in the same market, the petitioners could have shown how the repeal of the exemptions actually affected the investor marketplace. They had the benefit of several years' passage of time without the exemptions to compare marketplace interplay among local bank products and out-of-state non-bank products.

For example, the petitioners could have collected empirical evidence, both before and after the repeal, to show that investors tended to invest more in New Hampshire bank products before 1995, and, after 1995, shifted assets to non-bank products or invested equally in both since bank products no longer enjoyed the tax exemptions. Alternatively, they could have examined whether local banks readjusted their products after the repeal in an attempt to maintain the alleged competitive advantage over non-bank products and retain more investor dollars.

Instead of relying upon this kind of empirical analysis, the petitioners advanced a broad economic theory that the financial marketplace is global such that every financial investment competes with every other financial investment for every available investment dollar. As fact-finder, the trial court was free to reject this theory, however, and we find no legal error in its doing so. See Tennessee Gas Pipeline Co. v. Town of Hudson, 145 N.H. 598, 602 (2000) (trial court may accept or reject such portions of evidence presented, including that presented by expert witnesses).

The petitioners' expert, Professor Dennis Logue of the Tuck School of Business at Dartmouth College, testified that under modern portfolio theory, investments and financial vehicles share four characteristics: risk, return, convenience and liquidity. Consumers choose among products based upon the relative level of each of these characteristics. Because every financial investment has these four characteristics to different degrees, Professor Logue concluded that New Hampshire bank investment products necessarily compete with "virtually every other financial asset in the world in some way or another."

Professor Logue also predicted that, because of the exemptions, "New Hampshire investors would choose to hold a larger fraction of their financial wealth as deposits or instruments in New Hampshire banks than they would have absent the tax-advantaged status of those investments. That is to say, the effect of the tax exemption was to cause New Hampshire residents to hold fewer out-of-state securities than they might otherwise have held."

The respondents' evidence directly contradicted the petitioners' evidence. For instance, Marc Hebert, a certified financial planner, testified that although all financial vehicles share characteristics of risk, return, convenience and liquidity, the relative characteristics of such instruments may differ so significantly as to place them in different - and essentially non-competitive - "asset classes."

Dr. Margaret Guerin-Calvert, a consulting economist and principal of Economist, Incorporated, an economic consulting firm, testified that to measure competition among products or services, one must analyze either the extent to which price or other marketing changes to one product causes the producers of potentially alternative products to react competitively or the extent to which consumers of products treat other products as "substitutable" or "reasonably interchangeable."

After analyzing bank investment products and non-bank investment products, Dr. Guerin-Calvert concluded that, contrary to the petitioners' theory, all bank deposit products do not compete in a national market with all other financial instruments. She testified that, in the view of the Federal Reserve Board, for instance, banks offer unique services and products that are competitive only with the services and products offered by other banks. "[T]he only products to which consumers could and would turn in the event of a price increase of this set of products, would be similar products or sets of products produced by other banks." She also testified that the Federal Reserve Board defines the geographic scope of the markets in which banks compete with one another as local, not national.

Dr. Guerin-Calvert offered alternative explanations for some of the investment patterns the petitioners' expert had discovered. For instance, Professor Logue concluded that because consumers often have both low risk/low return assets, such as bank certificate of deposit accounts, and higher risk/higher return equities, such as common stock, and often transfer money between these two types of assets, these assets are substitutable for one another.

By contrast, Dr. Guerin-Calvert hypothesized that "[t]he fact that shifting funds out of a higher risk item and into a lower risk item reduces the overall or composite risk of a portfolio does not demonstrate that the two products are substitutes for each other. It does not demonstrate that small, but significant changes in the price of one are likely to result in large increases in the quantity purchased of the other. It could instead be reflective of consumers' interest in having a diversified set of items to meet a variety of needs."

Dr. Guerin-Calvert also conducted a regression analysis to see whether the investment behavior of consumers changed after the exemptions were repealed. She observed that "there was no substantial decline in [bank] deposit holdings in many deposit categories in New Hampshire banks" after the exemptions were repealed. She opined that the repeal, in fact, did not change investor behavior.

After weighing the conflicting evidence, the trial court concluded that the global financial marketplace the petitioners posited is actually comprised of a number of smaller sub-markets in which similarly situated institutions with substantially similar products compete against one another.

Relying, in part, upon our conclusion in Smith I, 141 N.H. at 689-90, that banks and bank stock are "different," the court ruled that the petitioners' economic theory failed to establish that out-of-state non-bank investment sources and New Hampshire banks competed with one another in the same market. The court observed that the petitioners had not proved that "investor decisions between non-bank sources of income and bank sources are ever governed by anything other than tax-neutral criteria." Further, the court noted that the petitioners did not "produce any evidence tending to show that any investor ever chose a New Hampshire bank product instead of an out-of-state non-bank investment because of the . . . tax exemptions." Nor was there any evidence that out-of-state non-bank investment sources "either saw themselves as competing in the same market with New Hampshire banks or acted as if they were." Absent this evidence, the court concluded that the petitioners had failed to show that the exemptions discriminated against out-of-state non-bank investment sources.

The trial court found, in particular, that "[p]rivate debt or equity instruments are not substitutable for and do not compete with bank depository products in a defined market."

The petitioners challenge this finding as not supported by the evidence. We disagree. This finding is amply supported by Dr. Guerin-Calvert's testimony.

For instance, before opining that bank products and services compete only in a market with the products and services offered by other banks, Dr. Guerin-Calvert explained the differences between equity instruments and bank depository instruments, including their different functions. For example, she testified that while consumers can readily obtain access to cash from bank depository products, they cannot do so for equity instruments such as stock. Moreover, unlike other instruments, bank depository products are federally insured. Further, investors use bank depository products for different purposes than other instruments.

The petitioners also challenge the trial court's finding that "[b]ecause local bank stock is privately held and rarely traded it is not substitutable for publicly-traded stock." This finding is also supported by the evidence.

Numerous witnesses testified that the stock in many New Hampshire banks was not publicly traded. Unlike stock traded on a national exchange, acquiring bank stock generally requires going through an auction process when the stock becomes available for sale. Witnesses also testified that, for a number of reasons, New Hampshire bank stock was neither as liquid as nor as marketable as non-bank stock.

Because we conclude that the evidentiary record fully supports the trial court's factual findings, we uphold its determination that investment products from out-of-state non-banks do not compete in the same market with investment products from New Hampshire banks. See Morgenstern, 147 N.H. at 561.

We disagree with the petitioners' assertion that whether the products of these entities compete in the same market is a legal question entitled to de novo review. This is a factual question entitled to deference. Moreover, because we hold that the trial court used the correct legal standard to determine whether the exemptions discriminated against out-of-state non-bank investment sources, there is no need to weigh the evidence against a different legal standard. Even were we to agree that the trial court used an incorrect legal standard, ordinarily we would not reweigh the evidence, but would remand to the trial court to do so. See Simplex Technologies v. Town of Newington, 145 N.H. 727, 732 (2001).

The petitioners' remaining arguments lack merit and warrant no further discussion. See Vogel v. Vogel, 137 N.H. 321, 322 (1993).

Affirmed.

NADEAU and DUGGAN, JJ., concurred.

APPENDIX B

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

No. 95-E- 059

[Filed August 10, 2000]

ERNEST T. SMITH, III, et al.)
)
v.)
)
N.H. DEPARTMENT OF REVENUE)
ADMINISTRATION, et al.)
)

ORDER

A class of similarly situated taxpayers has sued the New Hampshire Department of Revenue Administration, claiming that the New Hampshire interest and dividends tax ("the I&D tax"), in effect from 1923 until 1994, violated both the New Hampshire and the federal Constitutions. The Court (Manias, J.) transferred, without ruling, five constitutional questions to the New Hampshire Supreme Court, which ruled on two of them. The case is before this Court on remand, see Smith v. New Hampshire Dept. of Rev. Admin., 141 N.H. 681 (1997). A six-day hearing on this matter began on May 22, 2000. For the reasons stated below, the Court orders that the petitioners be given a partial refund of the I&D taxes they paid between 1991 and 1994.

I. FACTS

Since 1923, the State of New Hampshire has imposed a tax on income from interest and dividends. RSA 77:4 (1991). From the date of its enactment, this tax was subject to two exemptions that favored New Hampshire banks. These two exemptions were repealed in 1995. See 1995 N.H. Laws chapter 188.

The first of these exemptions is contained in a provision which deems taxable:

> [i]nterest from bonds, notes, money at interest, and from all debts due the person to be taxed, except interest from notes or bonds of this state, deposits in any credit union, savings bank, building and loan association, or savings department of any loan and trust company or national bank in this state or those of any state which exempts from taxation the principal or income of deposits in such institutions in this state owned by residents of that state and notes or bonds of any political subdivision of this state.

RSA 77:4, I (1991) (emphasis added). To qualify as a "bank in this state," a bank needs "only to have a branch" in New Hampshire. (Pet'r's Ex. 9, Tab A, 1991 N.H. Dept. of Rev. Admin. Form RP 10, "Quick Checklist.") The second exemption is contained in a provision that deems taxable:

> [d]ividends, other than stock dividends paid in new stock of the company issuing the same, on shares in all corporations and joint stock companies organized under the laws of any state, territory, or nation except New Hampshire state banks, trust companies, building and loan associations, credit unions, or national banks.

RSA 77:4, II (1991) (emphasis added). The bank-stock exemption applied only to dividends from stock in New Hampshire banks; dividends from stock in New Hampshire bank holding companies were not exempt. (Pet'r's Ex. 9, Tab A, 1991 N.H. Dept. of Rev. Admin. Form RP 10, "Quick Checklist.") Between 1991 and 1994, the Department's RP 10 form identified approximately two dozen New Hampshire banks whose stock dividends were exempt from the I&D tax. Of these banks, only six paid dividends between 1991 and 1994. These banks were: Berlin City Bank, Centerpoint Bank, Woodsville Guarantee Savings Bank, Lancaster National Bank, Siwooganock Savings Bank, and Community Bank & Trust Co.

The petitioners are a class of New Hampshire residents who paid taxes on interest and dividends from out-of-state investment sources from 1991 through 1994. These out-of-state sources of interest and dividends include: (1) the full range of bank deposits in out-of-state banks including savings accounts, checking accounts, negotiable order of withdrawal (NOW) accounts, money market accounts, and certificates of deposit; (2) stock in out-of-state stock banks; (3) stock in out-of-state bank holding companies; (4) municipal, state, and federal government bonds (and bond-based mutual funds); (5) treasury bills; (6) corporate bonds (including both "blue-chip" and "junk" bonds); (7) publicly traded stock (including equity-based mutual funds); and (8) money management accounts and other cash equivalents maintained by brokerages.

The petitioners filed this action in 1995. As an interlocutory appeal, this Court transferred without ruling five questions, three pertaining to the New Hampshire Constitution, the fourth to the Commerce Clause of the United States Constitution, and the last to the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. In Smith, the Supreme Court ruled that the challenged tax exemptions were valid under the State Constitution, id. at 691. In so ruling, the Court stated that the "exemptions from taxation at issue in this case were enacted for just reasons," id. at 688 (citation omitted), and specified that those "just reasons" include "encourage[ing] investment in domestic banks and financial institutions," id., thus "encouraging the financial health of domestic companies," id. The Court further characterized this "legislative decision to tax income differently based upon the situs of the payor," id., as "protectionist effort," id. In its analysis under the State constitution, the Court noted that while protectionism is entirely appropriate from the perspective of the State constitution, such a legislative effort constituted "precisely the discrimination that violated the commerce clause." Id.

As to the petitioners' Commerce Clause challenge, this Court transferred the following question:

> Whether the New Hampshire Interest and Dividends Tax, levied pursuant to N.H.R.S.A. Ch. 77, discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution because it taxes investment income earned from out-of-state payors while providing an exemption for investment income earned from certain instate payors.

Id. at 682-83. In response to this question, the Court both acknowledged and concurred with the State's concession, based upon Fulton Corp. v. Faulkner, 516 U.S. 325 (1996), a case decided after transfer of this case to the Supreme Court, that the exemptions discriminated against out-of-state banks and therefore violated the Commerce Clause of the U.S. Constitution, Smith, 141 N.H. at 684, 696. Because of this ruling, the Supreme Court did not address the federal equal protection challenge, id. at 697 and remanded the case to this Court.

II. DISCUSSION

A. Scope of the Case on Remand

The parties disagree over the meaning of the Supreme Court's remand order. The petitioners argue that the Smith Court: (1) ruled that the I&D tax was facially discriminatory and had both a discriminatory purpose and a discriminatory effect; and (2) remanded the case for determination of a single factual issue, whether any of the unconstitutional discrimination extended to out-of-state sources of investment income other than out-of-state bank products. In the petitioners' view, a simple showing of any competition between the exempted in-state bank investment products and out-of-state non-bank investment products would entitle the entire class to a full refund of all I&D taxes paid by its members between 1991 and 1994. The State contends, by contrast, that the Smith Court remanded the case for determinations of: (1) whether the challenged exemptions had the effect of violating the Commerce Clause with respect to out-of-state non-bank sources of investment income; and (2) the appropriate remedy, if any, for the conceded Commerce Clause violation as to investment income from out-of-state banks.

As this Court understands Smith, the questions on remand are: (1) Did the unconstitutional tax exemptions, which benefitted New Hampshire banks both facially and in purpose, have an "actual effect" on out-of-state non-bank sources of interest and dividends which entitles the petitioners to a remedy for taxes paid on interest and dividends from these sources?; and (2) What is the appropriate remedy, if any, for those who paid the New Hampshire interest and dividends tax from 1991 through 1994 on out-of-state bank-source interest and dividends and, if the answer to question one is "yes," for those who paid the I&D tax on income from out-of-state non-bank-source interest and dividends? In framing these issues, the Court concludes that the constitutionality of the exemptions has been decided and that any reference to "effect" in Smith relates only to determining the form and the extent of the remedy, a determination which does not require any further constitutional analysis.

The Court's view is based upon the express language of the Smith opinion. In the opening paragraph of its federal Commerce Clause analysis, the Smith court stated:

> The parties reserved the issue of remedy for the conceded commerce clause violation for the trial court. The State indicated in its pleadings before this court that fashioning a remedy "will require presentation of factual evidence and will include a resolution of such issues as (a) who will be entitled to relief, (b) what form that relief will take, and (c) severability of the statute." Given the complexity of this area of the law, we undertake a discussion of some of the cases to clarify the issues to be addressed on remand.

Id. at 691 (emphasis added). Based on the language quoted above, it seems apparent that this Court has been directed to determine the issue of remedy on remand. Furthermore, the Supreme Court plainly indicated that its lengthy discussion of the federal Commerce Clause was intended to clarify the issues to be addressed on remand, issues previously identified as relating to the question of remedy. The Supreme Court concluded its discussion of the Commerce Clause by noting that

> [i]n fashioning a remedy . . . the trial court must determine whether the petitioners can prove their claim that the effect of the exemptions for New Hampshire bank interest and dividends was to discriminate unlawfully against other sources of interest and dividend

> income, as opposed to discriminating solely against income earned on investments in out-of-state banks, as the State maintains.

Id. at 696 (emphasis added). The Court went on to explain that

> [i]f there has been no actual effect on the market because New Hampshire bank interest and dividends do not compete with other corporate investments, then the Federal Constitution has not been violated as to entities other than out-of-state banks. In order to determine the extent of the discrimination in this case, the trial court must make a factual determination whether New Hampshire bank interest and dividends compete with other sources of investment income such as stock dividends and bond interest. The petitioners must offer evidence to support a precise determination of the extent of the discrimination.

Id. (emphasis added) (citations and quotation marks omitted). Thus, the Supreme Court's principal references to "effect" and "competition" appear in the body of a paragraph which begins with the phrase "[i]n fashioning a remedy . . .." Smith, 141 N.H. at 696. This topic sentence controls the rest of the paragraph. Accordingly, the Court concludes that its job on remand is to fashion an appropriate remedy, not to undertake any further Commerce Clause analysis.[1]

B. Scope of the Remedy

The distinction between analyzing "effect" to determine whether a taxing scheme violates the Commerce Clause, and analyzing "actual effect" to determine a remedy may be important because the amount of inequality caused by a particular tax has no bearing on whether it violates the Commerce Clause, so long as similarly situated in-state and out-of-state taxpayers are treated differently by the tax in question. See, e.g., Maryland v. Louisiana, 451 U.S. 725, 760 (1981) ("[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates"). When determining a remedy, however, the actual effect must be precisely proven, which places a greater burden on the petitioners. In the context of determining a remedy, the concept of "actual effect" is analogous to demonstrable harm.

---

[1] Determining the issues to be decided on remand has been difficult. This Court is of the view that, given the Supreme Court's finding in Smith of facial discrimination as between in-state and out-of-state banks, it is neither necessary nor appropriate to conduct any further analysis of the "actual effect" of the exemptions upon other sources of investment income, either for the purpose of establishing a Commerce Clause violation or for the purpose of determining a remedy. Rather, the Court believes that the issue on remand should have been limited to determining an appropriate remedy for class members who paid taxes on dividends from stock in out-of-state banks or on interest from out-of-state bank deposits. The cases cited in Smith, in support of its directive to consider the actual effect on the market of the exemptions for New Hampshire bank interest and dividends when determining a remedy, were not cases about determining a remedy, but were cases deciding whether a statute, not discriminatory on its face, nevertheless had a discriminatory effect which caused the statute to violate the Commerce Clause. This Court could find no cases in which a court considered categories or entities beyond those subject to the Commerce Clause violation when determining a remedy.

In this particular case, however, this may be a distinction without a difference because, whether the facts are analyzed to determine discriminatory effect for the purpose of establishing a constitutional violation or are analyzed to determine actual effect for the purpose of specifying a remedy, the result is the same. The petitioners have not proven their case. The Court will first discuss whether the petitioners have proven "actual effect" entitling them to a remedy for taxes paid on non-bank sources of investment income.

The petitioners produced no evidence tending to show that any out-of-state non-bank sources of investment income were actually affected by the exemptions at issue. There was no evidence that, for example, any of these financial institutions ever raised their rates of return or took any other action in an attempt to neutralize the "competitive advantage" conferred on New Hampshire banks by the challenged exemptions. In other words, there was no evidence that these sources of investment income either saw themselves as competing in the same market with New Hampshire banks or acted as if they were. Nor did the petitioners produce any evidence tending to show that any investor ever chose a New Hampshire bank product instead of an out-of-state non-bank investment because of the RSA 77:4 tax exemptions. Thus, there is no evidence that any consumer/investor ever viewed or treated investment instruments in these two categories as competing in the same marketplace for their investment dollars. Rather, the petitioners' strategy for supporting "a precise determination of the extent of the discrimination," Smith, 141 N.H. at 696, by showing an "actual effect on the market," id., depends upon a theoretical approach to the global financial market. Such an approach is inadequate to prove actual effect and competition for purposes of proving entitlement to a remedy.

Even if, however, the Supreme Court had intended on remand that this Court would hear evidence to determine whether the unconstitutional discrimination against out-of-state banks extended to other non-bank sources of investment income, the petitioners still do not prevail.

When discrimination against interstate commerce exists, some entities within a state are benefitted, while other entities outside that state are burdened. See, Associated Indus. v. Lohman, 511 U.S. 641, 647 (1994) (Commerce Clause prohibits regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors); Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 511 U.S. 93, 99 (1994) (defining discrimination against interstate commerce as "differential treatment of in-state and out-of-state interests that benefits the former and burdens the latter"); see also Michael E. Smith, State Discriminations Against Interstate Commerce, 74 Cal. L. Rev. 1203, 1212 (1986). The Commerce Clause expresses a constitutional mandate that the mere fact that commerce crosses a state line should neither benefit in-state entities nor burden out-of-state entities. Id. at 1207.

Here, it is undisputed that the purpose of the tax exemptions was to encourage "the financial health of domestic companies," Smith, 141 N.H at 688, by encouraging "investment in domestic banks and financial institutions," id. It is equally undisputed that any benefit of the challenged tax exemptions flowed to New Hampshire banks. Smith, 141 N.H. at 695. More specifically, these benefits flowed to "any credit union, savings bank, building and loan association, or savings department of any loan and trust company or national bank in this state," RSA 77:4, I, and to "New Hampshire state banks, trust companies, building and loan associations, credit unions, or national banks," RSA 77:4, II. This benefit was, in turn, enjoyed derivatively by depositors and stockholders in New Hampshire banks because they did not pay taxes on some portion of their otherwise taxable investment income. According to the statute, the burden of these tax exemptions fell upon any credit union, savings bank, building and loan association, or savings department of any loan and trust company or national bank located outside this state that paid interest, and on out-of-state banks, trust companies, building and loan associations, credit unions and national banks that issued stock and paid dividends. This is the extent of the facial discrimination identified in Smith. By the terms of the statute, the out-of-state entities listed above were burdened because "a New Hampshire depositor's decision about whether to invest in a domestic or foreign bank [was] not governed by tax-neutral criteria." Id. at 696. Assuming that it is appropriate to analyze whether a statute that facially discriminates and has a discriminatory purpose also has a discriminatory effect which extends the unconstitutional discrimination beyond those entities which were discriminated against facially and in purpose, the petitioners still have not carried their burden.

The petitioners rely on Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) to support their argument that they need only to show a minimal or theoretical discriminatory effect on interstate commerce in order for them to prevail on their claim for full refund of all I&D taxes collected between 1991 and 1994. The petitioners' reliance on Bacchus is misplaced. Bacchus stands for the proposition that if two products compete in the same market, the relative competitive strength of the two products is immaterial to determining whether the Commerce Clause is violated by a state regulation that favors the in-state product over the out-of-state product. In Bacchus, the Supreme Court analyzed whether a tax exemption, seemingly discriminatory on its face, id. at 268, nevertheless had an unconstitutional purpose and effect of encouraging the purchase of local alcoholic beverages, to the economic detriment of imported alcoholic beverages. The Court determined that although sales of the exempted, locally produced liquors was so low as to pose only a negligible threat of drawing consumer dollars away from non-exempt imported liquors, the exemption nonetheless violated the Commerce Clause. Id. at 269 ("neither the small volume of sales of exempted liquor nor the fact that the exempted liquors do not constitute a present "competitive threat" to other liquors is dispositive of the question whether competition exists between the locally produced beverages and foreign beverages; instead they only go the extent of such competition").

Based upon its finding that the Hawaii "legislature originally exempted the locally produced beverages in order to foster the local industries by encouraging increased consumption of their product," id. at 269, the Supreme Court reasoned that "one way that the tax exemption might produce that result is that drinkers of other alcoholic beverages might give up or consume less of their customary drinks in favor of the exempted products because of the price differential that the exemption will permit," id. In analyzing the competitive threat posed by the local Hawaiian products, the Supreme Court considered only those products which were economic counterparts of, or similarly situated to, the favored products. Those economic counterparts, in turn, were the products subject to the facial and purposeful discrimination: other alcoholic beverages. The Court reasoned that a dollar spent on okolehao[2] is a dollar that might not be spent on a six-pack of Budweiser, a pint of Jack Daniels, or a bottle of Dom Perignon. The Court did not consider whether the tax exemption for local alcoholic beverages had any effect on non-alcoholic beverages such as Coca-Cola, which are not economic counterparts of, or similarly situated to, the favored local products.

In determining whether the favored New Hampshire bank products were economic counterparts of, or similarly situated to, out-of-state non-bank sources of investment income and, therefore, whether the tax exemption had an effect on the market for those investments, this Court will begin with the observation, as discussed above, that out-of-state non-bank investment products are not subject of the facial discrimination found in Smith. According to one commentator,

---

[2] a brandy distilled from the root of the ti plant, an indigenous shrub of Hawaii, Bacchus, 468 U.S. at 265.

> [w]hen a regulation, is discriminatory on its face, the very terms of the regulation deal unequally with people inside and outside the state. There is no need to resort to any additional information . . . to discern that the state has given an advantage to insiders.

Smith, supra, 74 Cal. L. Rev. at 1239.

By their very terms, the statutory exemptions at issue in this case economically protected New Hampshire banks. New Hampshire banks were advantaged to the disadvantage of out-of-state banks. See Smith, 141 N.H. at 696. The exemptions encouraged investment in New Hampshire banks by providing an economic benefit to investors in in-state banks which investors in out-of-state banks did not receive. Thus, the exemptions were facially discriminatory and violated the Commerce Clause.

While Smith did not explicitly identify the financial institutions that were burdened by the facial discrimination which benefitted in-state banks, it clearly implies that the facial discrimination extended only to out-of-state banks. Specifically, the Court stated that

> the tax discriminates against interstate commerce to the direct competitive advantage of New Hampshire banks. The tax's distinction between in-state and out-of-state banks is

> unconstitutional because a New Hampshire depositor's decision about whether to invest in a domestic or foreign bank is not governed by tax-neutral criteria.

Id. at 696.

Clearly, the entities benefitted and burdened by the facial discrimination, in-state and out-of-state banks, are economic counterparts competing in the same marketplace. The question, then, is whether other investment products, not subject to facial discrimination, are economic counterparts. Regarding such a determination, the U.S. Supreme Court has articulated the following principles:

> Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities. Although this central assumption has more often than not itself remained dormant in this Court's opinions on state discrimination subject to review under the dormant Commerce Clause, when the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes. This is so for the simple reason that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed. If in fact that should be the case, eliminating the tax or other regulatory differential would not serve

> the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors. . . .
>
> . . .
>
> . . . Thus, in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it to which the dormant Commerce Clause may apply. The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such.

General Motors Corp. v. Tracy, 519 U.S. 278, 298-300 (1997)(holding that natural gas "bundled" with certain customer services and sold by local distribution companies did not compete with "unbundled" natural gas sold by producers or independent marketers). See also Alaska v. Arctic Maid, 366 U.S. 199, 204 (1961) (acknowledging a distinction between salmon sold out of state for canning and fresh-frozen salmon sold in state, and recognizing that not all fish caught commercially, even of the same species, compete economically with each other).

At the hearing on remand, most of the evidence presented by both sides went to establishing the economic nature of and relationships among the various financial instruments that generate interest and dividend income rather than the actual competitive effect of the exemptions on them.

The testimony offered by both sides demonstrates that people holding cash assets are faced with a wide range of financial instruments in which they may invest. Any one of these instruments may be evaluated in terms of four criteria: (1) risk; (2) reward/return; (3) convenience; and (4) liquidity. Evidence presented by both sides indicates that financial investment instruments may be arrayed along a continuum, with checking and savings accounts at the low risk/low return end and corporate stocks at the high risk/high return end. According to "portfolio theory," the typical prudent investor will allocate his or her assets among a range of financial instruments in order to minimize risk and maximize return, based upon that investor's own particular financial needs and tolerance for risk, among other factors. As well, the typical prudent investor will periodically "rebalance" his or her portfolio, based upon changes in external factors (such as interest rates, inflation rates, or the performance of various sectors of the economy) and changes in internal factors (such as a need for less risk as a person saving for retirement approaches retirement age).

As to all of the foregoing, the parties essentially agree; the only factual issue in dispute is whether every financial instrument, from checking accounts to corporate stock, competes with every other financial instruments for every available investment dollar, or whether competition for investment dollars exists only among a more limited range of financial instruments, specifically, those with very similar risks, returns, convenience, and liquidity. The petitioners allege that each of the investment instruments that generated income on which they have paid the I&D tax competes with all other financial instruments in a global financial market. Based upon the evidence, the Court is persuaded that while there may well be a single, world-wide capital market, in which all investments are equally available to any given investor, the mere existence of such a market does not lead to the conclusion that every financial instrument available in that market competes, at least in a constitutional sense, with every other financial investment instrument. In other words, just because corporate stock easily may be liquidated and deposited into a checking account does not mean that checking accounts and corporate stock directly compete with one another for the cash assets of investors.

Rather, as described by the petitioners' own expert, both portfolio theory and asset allocation are based upon the underlying principle that differences among financial instruments cause them not to compete with one another for specific investment dollars. For example, a person who has been saving for retirement and who is within a few years of retirement age will typically shift from financial instruments with higher risks and returns (such as corporate stocks and stock-based mutual funds) to financial instruments with lower risks and lower returns (such as short-term bonds and certificates of deposit). Such shifts are made precisely because a need for short-term security dictates that high-risk financial instruments cannot compete with low-risk financial instruments for that particular investor's dollar. In other words, the global financial marketplace theorized by the petitioners is actually made up of a number of smaller sub-markets in which similarly situated institutions compete as providers of substantially similar products. See General Motors Corp., 519 U.S. at 298.

It is perhaps useful to analogize the global financial market hypothesized by the petitioners to a supermarket. Just as the global financial market contains many different investment options, a supermarket contains many different consumer choices. It does not follow, however, that all the products in a supermarket compete with one another for consumer dollars. Consumers have different desires, needs and budgets, and their product choices are dictated by these factors. Atypical consumer's shopping cart may contain bananas, ground turkey, cat food, and shampoo. It would be difficult to argue, however, that the bananas compete with the cat food, or even the ground turkey, for the funds allocated by the supermarket consumer.

Similarly, while a broad array of financial investment options are available, investor choices are dictated by individual desires, needs and availability of investment funds. Just as all products in a supermarket are not "substantially similar entities," not all investment products are economic counterparts which compete with one another in a Commerce Clause sense. Rather, investment products vary in nature and purpose. Competition does not occur among all these products but instead occurs among those products in the same subgroup, that is, products substitutable for one another because they are of a similar nature and serve similar functions and purposes. Whereas the multitude of cat foods compete with one another for consumer dollars, cat food does not compete with bananas. Similarly, while all the various CD offerings compete with one another for investor dollars, CD offerings do not compete with checking accounts. This conclusion was presaged by the New Hampshire Supreme Court which explained that from a statutory perspective, " [b]anks are different," Smith, 141 N.H. at 689, and " [j]ust as banks differ from other institutions, bank deposits differ from other investments. Stock in a 'stock bank' is a different sort of stock." Id. at 690.

Even in a general sense, then, the petitioners have not shown that investor decisions between non-bank sources of income and bank sources are ever governed by anything other than tax-neutral criteria. With regard to New Hampshire banks, the petitioners' argument regarding competition is even more dubious. Investors in New Hampshire bank products are often motivated by such personal, non-profit concerns as location and convenience.[3] For the reasons stated above, no remedy is due to those investors who paid the New Hampshire I&D tax on out-of-state, non-bank sources of investment income.

C. Nature of the Remedy for Out-of-State Bank Investment Income

The petitioners argue that they are entitled to a refund of all taxes paid on interest and dividends to the State of New Hampshire from 1991 through 1994. Given the Court's ruling above, the petitioners are entitled to a remedy only for those taxes paid on interest paid on out-of-state bank deposits and dividends from stock in out-of-state stock banks. The State argues that the petitioners are entitled to no remedy at all because they have not proven that they "have borne the economic burden of the tax." Cagan's, Inc. v. N.H. Dept. of Rev. Admin., 128 N.H. 180, 183 (1986) .

---

[3] The argument that stock in New Hampshire banks competes with stock of corporations is particularly weak where New Hampshire bank stock is not even publicly traded and generally the only way to know whether it is even available for sale is to call the bank and ask. One would then get on a list and wait until such stock becomes available, at which time the stock is auctioned and sold to the highest bidder. The price of the stock at sale determines the present value of the stock.

The Court now turns to the principles that govern the remedy phase of a Commerce Clause case. As a preliminary matter, the Court notes that the United States Supreme Court cases relied upon by both parties and by Smith are all but silent on the question of remedies. This is not especially surprising given that the role of appellate courts in most Commerce Clause cases is to determine whether a particular statute or regulation violates the Commerce Clause. Where such a violation is found, the case is typically remanded for a determination of remedy based upon additional fact finding and appropriate state law considerations. See e.g., Fulton, 516 U.S. at 347; Bacchus, 468 U.S. at 277. The Supreme Court has, however, established the general principle that

> [i]f a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

McKesson v. Division of Alcoholic Beverages, 496 U.S. 18, 31 (1990). As to specific remedies,

> a combination of a partial refund to petitioner and a partial retroactive assessment of tax increases on favored competitors, so long as the resultant tax actually assessed during the contested tax period reflects a scheme that does not discriminate against interstate commerce, would render [the] . . . resultant deprivation lawful and therefore satisfy the Due Process Clauses's requirement of a fully adequate postdeprivation procedure.

Id. at 41. McKesson concludes its discussion of remedies by explaining that a state

> may satisfy [its] obligation through any form of relief, ranging from a refund of the excess taxes paid . . . to an offsetting charge to previously favored [taxpayers], that will cure any unconstitutional discrimination against interstate commerce during the contested tax period. The State is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined.

Id. at 51.

The nature of the remedy due in this case is suggested by statute. By its own terms, RSA chapter 77 is intended "not to impose any tax upon any income in violation of the

Constitution of the United States . . . " RSA 77: 2 (1991). The payment of any unconstitutional tax would constitute an overpayment. Under RSA 21-J:28-a (Supp. 1999), the remedy for an overpayment of taxes is a refund or credit. The State takes the position that the finding of a Commerce Clause violation did not necessarily entitle the petitioners to any remedy because they have not proven that they were actually harmed. The State argues, and presented evidence supporting its argument, that the petitioners, as rational investors, sought greater returns from out-of-state investments which compensated for any benefit to in-state bank deposits or dividends. The Court does not agree with the State's analysis. The petitioners need not show such actual harm in order to be entitled to relief for a Commerce Clause violation. Although the State may have a variety of ways to remedy the unlawful discrimination, it must do so. Moreover, just by virtue of paying the unconstitutional tax, the petitioners have proven that they "have borne the economic burden of the tax."

The State further argues that even if the petitioners are entitled to relief, they are not necessarily entitled to a refund. This may be so. A state "may satisfy (its) obligation through any form or relief ranging from a refund of the excess taxes paid . . . to an offsetting charge to previously disfavored (taxpayers), that will cure any unconstitutional discrimination against interstate commerce. . . ." McKesson, supra at 51. However, the State has not suggested an alternative remedy, such as a credit toward future taxes or a retrospective collection of taxes from those who had enjoyed the benefit of the unconstitutional exemptions. At this point the only fair, feasible and lawful remedy for the Commerce Clause violation is a refund.

Accordingly, the petitioners are entitled to a refund of all New Hampshire I&D taxes paid for the years 1991 through 1994 on: (1) interest on any deposits or other investment products in out-of-state banks; and (2) dividends from stock in out-of-state stock banks.

The Court rules on the petitioners' requests for findings of fact as follows:

GRANTED: 1-34, 35 & 36 (consistent with the Court's order), 38-42, 43 (although usually on a temporary basis), 45-50, 53, 55, 56 (consistent with the Court's order), 57 (as to out-of-state banks), 58, 60-63, 65, 67, 68, 71-81, 85, 86, 90(b), 91, 93-96, 99-103, 107, 108, 111-113, 117-119, 121, 126-131, 135(a), 137-146.

DENIED: 37, 44 (as to the term "substituted"), 51, 52, 54, 64, 66, 82-84, 87-89, 90(a, c-h), 92, 97, 98, 105, 106, 109, 110, 114-116, 120, 122-125, 132-134, 135(b-o), 147, 148.

NEITHER GRANTED NOR DENIED: 59, 69, 70, 104, 136.

The Court rules on the petitioners' requests for rulings of law as follows:

GRANTED: A (consistent with the Court's order), B, C, E, K, Q, U (consistent with the Court's order).

DENIED: D, F, G-J, L-P, S, T.

The Court rules on the State's requests for findings of fact and rulings of law as follows:

GRANTED: 1 (consistent with the Court's order), 2-7, 8(i), 9-14, 19 (as to non-bank investment products), 20, 21, 23-58, 60-75, 77-103, 107, 112, 113 (generally speaking), 114-120, 122, 123,

DENIED: 15, 16, 19 (as to bank products), 108, 121, 124.

NEITHER GRANTED NOR DENIED: 8(ii), 17, 18, 22, 59, 76, 104-106, 109-111,

So ordered.

Dated: August 10, 2000

/s/__________________
Kathleen A. McGuire,
Presiding Justice

APPENDIX C

SUPREME COURT OF NEW HAMPSHIRE

No. 95-852

[Decided April 3, 1997]

ERNEST T. SMITH, III & a.

v.

NEW HAMPSHIRE DEPARTMENT
OF REVENUE ADMINISTRATION & another.

JUDGES:
BROCK, C.J. All concurred.

OPINION

BROCK, C.J. This is an interlocutory appeal under Supreme Court Rule 9. The Superior Court (*Manias*, J.) transferred without ruling five questions:

> 1. Whether the New Hampshire Interest and Dividends Tax, levied pursuant to N.H.R.S.A. Ch. 77, discriminates amongst similarly situated taxpayers on the basis of the identity or situs of the payor of the taxpayer's investment income, in violation of the New Hampshire State Constitution, Part 1, Article 12.

2. Whether the New Hampshire Interest and Dividends Tax levied by N.H.R.S.A. Ch. 77 levies unreasonable or disproportional taxes upon similarly situated taxpayers on the basis of the identity or situs of the payor of the taxpayer's investment income, in violation of the New Hampshire State Constitution, Part 2, Article 5.

3. Whether the New Hampshire Interest and Dividends Tax, levied pursuant to N.H.R.S.A. Ch. 77, impermissibly classifies taxpayers on the basis of the identity or situs of the payor of the taxpayer's investment income rather than class of property, in violation of the New Hampshire State Constitution, Part 2, Article 6.

4. Whether the New Hampshire Interest and Dividends Tax, levied pursuant to N.H.R.S.A. Ch. 77, discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution because it taxes investment income earned from out-of-state payors while providing an exemption for investment income earned from certain instate payors.

5. Whether the New Hampshire Interest and Dividends Tax, levied pursuant to N.H.R.S.A. Ch. 77 discriminates amongst similarly situated taxpayers on the basis of the identity or situs of the payor of the taxpayer's investment income, in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because it taxes investment income earned from out-of-state payors while

providing an exemption for investment income earned from certain instate payors.

The trial court specifically did not transfer the issues of the appropriate remedy if the challenged tax is found to be unconstitutional and the constitutionality under the State and Federal Constitutions of the tax exemption for interest on State and municipal bond obligations.

The petitioners are New Hampshire residents who have earned interest and dividend income from various sources and have paid New Hampshire taxes on that income as required by RSA chapter 77 (1991 & Supp. 1994), commonly referred to as the "Interest and Dividends Tax." They contend that two exemptions authorized under RSA chapter 77 during the 1991 through 1993 calendar years violated part I, article 12 and part II, articles 5 and 6 of the New Hampshire Constitution, and the commerce and equal protection clauses of the United States Constitution. The statute was amended effective January 1, 1995, to eliminate the exemptions at issue.

Pursuant to former RSA chapter 77, the State levied a tax on four classes of taxable property, two of which are at issue in this case. The first is "[i]nterest from bonds, notes, money at interest, and from all debts due the person to be taxed." RSA 77:4, I (1991). The second is "[d]ividends, other than stock dividends paid in new stock of the company issuing the same, on shares in all corporations and joint stock companies organized under the laws of any state, territory, or nation." RSA 77:4, II (1991).

Prior to 1995, the statute exempted from taxation certain income that would otherwise fit within the above definitions. The interest provision exempted interest from

> deposits in any credit union, savings bank, building and loan association, or savings department of any loan and trust company or any national bank in this state or in those of any state which exempts from taxation the principal or income of deposits in such institutions in this State owned by residents of that state.

RSA 77:4, I. The dividend provision exempted dividends from "New Hampshire state banks, trust companies, building and loan associations, credit unions, or national banks." RSA 77:4, II.

Prior to oral argument before this court, the State withdrew its commerce clause defenses based upon the United States Supreme Court's recent decision in *Fulton Corp. v. Faulkner*, 516 U.S. 325, 116 S.Ct. 848, 133 L.Ed.2d 796 (1996). The State conceded that the exemptions formerly contained in RSA chapter 77 violated the commerce clause of the United States Constitution. The State's statement of the issues remaining in dispute provides:

> The State has conceded that the former exemptions for (i) interest paid by New Hampshire depository institutions and (ii) dividends paid by a handful of New Hampshire stock banks violated the Commerce Clause, because they did not apply to income

> from similar out-of-state payors. Those who have been aggrieved by the Commerce Clause violation are entitled to seek "meaningful backward looking relief."

See McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 31, 110 S.Ct. 2238, 2247, 110 L.Ed.2d 17 (1990).

The parties, however, maintain different positions on the scope of the State's commerce clause concession and its impact on the remedy phase of this litigation. The petitioners contend that by conceding that former RSA chapter 77 violated the commerce clause by discriminating between interest and dividends earned from in-state banks and interest and dividends earned from out-of-state banks, the State must also concede that the commerce clause was violated by favoring New Hampshire bank interest and dividends over other types of investment income such as out-of-state corporate stock dividends and bond interest. The petitioners argue that the State's admission that the former exemptions affected interstate commerce applies to all out-of-state investments under the commerce clause.

The State concedes that to the extent it treated in-state and out-of-state bank interest and dividends differently, it violated the commerce clause. The State argues, however, that the commerce clause is not violated as to interest and dividends earned on out-of-state corporate sources because that income is taxed equally regardless of where the corporation is located. The State's position is that the scope of the commerce clause violation is the distinction between in-state and out-of-state activity within a specific class of property; namely, income received from depository banks.

I. State Constitution

The petitioners contend that former RSA chapter 77 violates the State Constitution "because it imposes a non-uniform, unequal, disproportionate, unreasonable and unfair tax burden." They further contend that "there can be no 'just reason' for a legislative tax classification that violates the commerce clause," and thus the State's commerce clause concession obviates the need for review under the New Hampshire Constitution. We disagree.

Disposition of the federal constitutional questions presented on this transfer is not dispositive of the State constitutional questions. *See Opinion of the Justices*, 114 N.H. 174, 179, 317 A.2d 568, 571 (1974) (concluding that classification of property for taxation was proper under State Constitution while refusing to opine on permissibility under Federal Constitution). Similarly, the State's withdrawal of its federal commerce clause defenses has no effect on our State analysis. The United States Constitution includes provisions governing the regulation and protection of interstate commerce, U.S. CONST. art. I, § 8, cl. 3, and ensuring that all persons are afforded equal protection under the laws, U.S. CONST. amend. XIV. The questions raised by the State constitutional challenge, however, concern the State's decision to classify, as taxable property, income based upon the classification of its payor, or the situs of the account, N.H. CONST. pt. II, art. 6. *See Opinion of the Justices*, 114 N.H. at 177-78, 317 A.2d at 570 (reviewing broad legislative prerogative to classify property). Although the legislative decision to treat New Hampshire and out-of-state sources of income differently concededly violates the commerce clause, we might conclude that it was valid under the State Constitution, which we examine independently. *See State v. Ball*, 124 N.H. 226, 231, 471 A.2d 347, 350 (1983). In fact, our constitution supports favoring New Hampshire interests over others, as the legislature is empowered to enact laws as its members "may judge for the benefit and welfare of this state." N.H. CONST. pt. II, art. 5; *see Opinion of the Justices*, 114 N.H. at 178, 317 A.2d at 571 (tax exemption promoting State's general welfare is just); *cf. The Housing Partnership v. Town of Rollinsford*, 141 N.H. 239, 241-42, 683 A.2d 189, 190-91 (1996) (discussing charitable exemption to property tax).

Three provisions of the New Hampshire Constitution work in conjunction to ensure the fairness of any scheme of taxation enacted by our legislature. First, part I, article 12 establishes that "[e]very member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection." This article requires that a given class of taxable property be taxed at a uniform rate, *Opinion of the Justices*, 123 N.H. 296, 301, 460 A.2d 93, 97 (1983), and that "[t]axes must be not merely proportional, but in due proportion, so that each individual's just share, and no more, shall fall upon him," *Rollins v. Dover*, 93 N.H. 448, 449, 44 A.2d 113, 114 (1945) (quotation omitted). This provision literally imposes a requirement of proportionality of a taxpayer's portion of the public expense, "according to the amount of his taxable estate," *Opinion*, 4 N.H. 565, 568 (1829), and requires that similarly situated taxpayers be treated the same, *see Eyers Woolen Co. v. Gilsum*, 84 N.H. 1, 16-17, 146 A. 511, 519 (1929).

Second, part II, article 5 provides the General Court the authority "to impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and residents within, the . . . state." This section requires "that all taxes be proportionate and reasonable[,] equal in valuation and uniform in rate, and just." *Opinion of the Justices*, 131 N.H. 640, 642, 557 A.2d 273, 275 (1989) (quotation omitted); *see Opinion*, 4 N.H. at 569. Together, part I, article 12 and part II, article 5 "establish equality and justice as the basis of all constitutional taxation." *State v. Express Co.*, 60 N.H. 219, 236 (1880) (Stanley, J.).

Third, part II, article 6 authorizes the legislature to "classify" property for purposes of taxation. *See Opinion of the Justices*, 123 N.H. 344, 348, 461 A.2d 129, 131 (1983); *Opinion of the Justices*, 123 N.H. at 305, 460 A.2d at 100. This provision grants the legislature broad power to declare property to be taxable or non-taxable based upon a classification of the property's kind or use, but not based upon a classification of the property's owner. *Opinion of the Justices*, 115 N.H. 306, 308, 339 A.2d 450, 451-52 (1975); *Opinion of the Justices*, 84 N.H. 559, 569, 149 A. 321, 326 (1930). Together, part II, articles 5 and 6 "permit the disproportionality inherent in taxes levied upon . . . classes of property," so long as there is uniformity and proportionality within each class. *Opinion of the Justices*, 111 N.H. 206, 209, 278 A.2d 348, 350 (1971) (quotation omitted). Strictly speaking, "the rule of equality and proportionality does not apply to the selection of the subjects of taxation, provided just reasons exist for the selection made." *Opinion of the Justices*, 94 N.H. 506, 508, 52 A.2d 294, 295 (1947).

Together, these three constitutional provisions require that taxation be just, uniform, equal, and proportional; in addition, our constitution demands that classifications be made between types of property, not taxpayers. *See Opinion of the Justices*, 131 N.H. at 642, 557 A.2d at 275; *Opinion of the Justices*, 123 N.H. at 348, 461 A.2d at 131; *Opinion*, 4 N.H. at 568. We have

> consistently interpreted the constitutional provisions relating to the taxing power to require that a tax imposed by the legislature against a distinct class of property be at a uniform rate. A tax must be in proportion to the actual value of the property subject to tax, and it must operate in a reasonable manner.

Johnson & Porter Realty Co. v. Comm'r of Rev. Admin., 122 N.H. 696, 698, 448 A.2d 435, 436 (1982) (citations omitted).

"It is well established that our legislature has liberal powers with respect to the classification of taxable property. A reasonable classification which is sufficiently inclusive to constitute a distinctive class will be upheld." *Opinion of the Justices*, 114 N.H. at 177, 317 A.2d at 570 (citation omitted). We accordingly limit our review of legislative taxation classifications to a determination whether there are "just reasons" for the classification. *Opinion of the Justices*, 115 N.H. at 308, 339 A.2d at 451. In this context, "[a] just reason is the equivalent of a reasonable or rational basis."

Cagan's, Inc. v. Dep't of Rev. Admin., 126 N.H. 239, 246, 490 A.2d 1354, 1359 (1985).

The legislative power to classify property includes the power to exempt property from taxation. *Opinion of the Justices*, 82 N.H. 561, 571, 138 A. 284, 289 (1927). Although "[i]nequality in taxation is the result of every exemption," *Petition of Savings Bank*, 68 N.H. 384, 387, 36 A. 17, 19 (1895), "[e]xemptions are justified as an exercise of . . . the other powers which provide for the common benefit, protection, and security, and which may be conveniently grouped under the name of the protective power," *Opinion of the Justices*, 82 N.H. at 571, 138 A. at 289 (quotation omitted). *See Opinion of the Justices*, 94 N.H. at 508-09, 52 A.2d at 295. It has long been our opinion that

> [t]o establish the rules by which each individual's just and equal proportion of a tax shall be determined is a task of much difficulty, and a very considerable latitude of discretion must be left to the legislature on the subject. Within the limits of this discretion, as to the selection of proper subjects of taxation and the proportion of the tax that shall be laid on each subject, the authority of the legislature is, without question, supreme.

Town of Canaan v. Enfield Village Fire District, 74 N.H. 517, 539, 70 A. 250, 258 (1908) (quotation and ellipsis omitted). An exemption is proper under the legislature's taxing power so long as the legislature relies on a distinction between the taxable and nontaxable property that "is a reasonable one, in the sense that it may be deemed to be just." *Opinion of the Justices*, 82 N.H. at 573, 138 A. at 290.

The exemptions from taxation at issue in this case were enacted for just reasons. *See Opinion of the Justices*, 115 N.H. at 308, 339 A.2d at 451. The situs exemption treats interest and dividend income differently depending on the situs of its payor, classifying the sources of New Hampshire taxpayers' investment income based upon its origin; the provision does not impermissibly discriminate among New Hampshire taxpayers, see *Opinion of the Justices*, 106 N.H. 202, 205, 208 A.2d 458, 461 (1965) (property, not taxpayers, may be classified for taxation). By classifying investment income in this way, the General Court encourages investment in domestic banks and financial institutions. The members of our legislature are empowered to enact "all manner of wholesome and reasonable . . . laws . . . as they may judge for the benefit and welfare of this state." N.H. CONST. pt. II, art. 5. Encouraging the financial health of domestic companies is a just reason for legislative action in the form of tax exemption. *See Opinion of the Justices*, 114 N.H. at 178, 317 A.2d at 571.

> The resulting inequality or discrimination against unexempted property is not fatal to the constitutionality of the exemption. Inequality of taxes laid is forbidden, but inequality caused by taxing some property and not taxing other is permitted.
>
> The purpose of the proposed exemption, being one properly within the legislature's discretion

> in acting for the welfare of the state, furnishes a just reason therefor.

Opinion of the Justices, 87 N.H. 490, 491, 178 A. 125, 126 (1935) (quotation and citation omitted).

This is precisely the discrimination that violates the commerce clause, as the State has conceded. The limiting power of the United States Constitution over state action in such circumstances, *see Opinion of the Justices*, 87 N.H. 496, 498-99, 179 A. 409, 410 (1935), renders futile the protectionist effort, but it does not render the effort invalid under the State Constitution. *Cf. Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359, 93 S.Ct. 1001, 1003, 35 L.Ed.2d 351 (1973) (recognizing that "the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation").

Having concluded that the legislative decision to tax income differently based upon the *situs* of the payor was enacted for just reasons, we turn to the question whether the decision to tax *banks* differently satisfies the same inquiry. Banks are sufficiently unique -- with distinct characteristics and a distinct role in society -- so as to make the exemption "sufficiently inclusive to constitute a distinctive class." *Opinion of the Justices*, 114 N.H. at 177, 317 A.2d at 570; *see Opinion of the Justices*, 87 N.H. at 491, 178 A. at 126.

Banks are different. The General Court has treated banks differently from other institutions when taxing their assets directly. *See Petition of Savings Bank*, 68 N.H. at 386, 36 A. at 18-19; cf. *Manchester Sav. & Loan Ass'n v. State Tax Commission*, 105 N.H. 17, 20-21, 191 A.2d 529, 532

(1963) (discussing differences between State credit unions and federal savings and loan associations and approving of different tax treatment); *Opinion of the Justices*, 102 N.H. 189, 190, 153 A.2d 407, 408 (1959) (referring to banks as "peculiarly subject to regulation").

Banks play an important role in our economy. By general definition, a bank is "an establishment for the custody, loan, exchange, or issue of money, for the extension of credit, and for facilitating the transmission of funds by drafts or bills of exchange." Webster's Third New International Dictionary 172 (unabridged ed. 1961); *see* Black's Law Dictionary 144 (6th ed. 1990). When commenting on the importance of prudent management of New Hampshire banks, this court observed that

> [i]t is of vast importance to the commercial prosperity, the manufacturing activity, and the industrial welfare of the community that banks be managed with integrity and sagacity and according to the rules of law prescribed for their administration. The savings of the poor, the earnings of the thrifty, and the resources of the wealthy, alike depend upon the prevention of delinquency on the part of those who control and direct the affairs of banks.

Opinion of the Justices, 102 N.H. at 190, 153 A.2d at 408 (quotation omitted). The United States Congress has found that federally regulated banks must "serve the convenience and needs of the communities in which they are chartered to do business," and that they "have [a] continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered." 12 U.S.C. § 2901(a)(1), (3) (1994) (findings and purpose statement of Community Reinvestment Act of 1977). Other courts have recognized the distinct characteristic powers, privileges, and responsibilities of banks when concluding that they may be classified apart from other institutions for taxation purposes. *See, e.g., Brophy v. Powell*, 58 Ariz. 543, 121 P.2d 647, 656 (Ariz. 1942) (nature of banks makes placing them "in a class entirely distinct from other institutions" reasonable); *Commonwealth v. Madden's Ex'r*, 265 Ky. 684, 97 S.W.2d 561, 563-64 (1936) (recognizing broad authority to classify institutions separately for tax purposes); *Memphis Bank and Trust Co. v. Garner*, 624 S.W.2d 551, 554 (Tenn. 1981) (banks may be classified separately under state constitution), *rev'd on other grounds*, 459 U.S. 392, 103 S. Ct. 692, 74 L.Ed.2d 562, (1983); *Bank of Texas v. Childs*, 615 S.W.2d 810, 815-16 (Tex. Ct. App. 1981) (banks sufficiently different from other businesses to validate differing tax treatment), *rev'd on other grounds sub nom. American Bank & Trust Co. v. Dallas County*, 463 U.S. 855, 103 S.Ct. 3369, 77 L.Ed.2d 1072 (1983); *State v. Clement Nat. Bank*, 84 Vt. 167, 78 A. 944, 954 (1911) (taxation of bank deposits does not violate proportionality requirement in state constitution), *aff'd*, 231 U.S. 120, 34 S.Ct. 31, 58 L.Ed. 147 (1913); *In re National Bank of West Virginia at Wheeling*, 137 W. Va. 673, 73 S.E.2d 655, 665 (1952) (uniformity requirement does not extend to "different classes of businesses").

Just as banks differ from other business institutions, bank deposits differ from other investments. Stock in a local "stock bank" is a different sort of stock. The exemptions for interest on deposits in banks, RSA 77:4, I, and for dividends paid by New Hampshire "stock banks," RSA 77:4, II, recognize the inherent differences between banks and other business organizations, including other financial organizations. We conclude that banks thus are "a distinctive class," *Opinion of the Justices*, 114 N.H. at 177, 317 A.2d at 570, and that recognition of the inherent differences constitutes just reasons, see *Opinion of the Justices*, 94 N.H. at 508, 52 A.2d at 295, for differing tax treatment. *See Opinion of the Justices*, 114 N.H. at 178, 317 A.2d at 570-71. Accordingly, we hold that the legislative classification of banks separate from other businesses for tax purposes is valid under the New Hampshire Constitution.

In reaching this conclusion, we reject the petitioners' argument that the exemptions impermissibly classify *taxpayers*, as opposed to classifying property. *See Opinion of the Justices*, 84 N.H. at 569, 149 A. at 326. The scheme of taxation contained in RSA chapter 77 classifies banks as comprising a different type of payor of investment income, either in the form of interest or dividends. Further, we reject the petitioners' contention that, essentially, all "intangible" investments must be classified together by the legislature. We have stated before that different types of investment income may be treated differently for tax purposes, specifically noting the differing characteristics of capital gains, interest, and dividends, and specifically authorizing their different tax treatment. *Opinion of the Justices*, 117 N.H. 512, 516, 374 A.2d 964, 966 (1977); *see Opinion of the Justices*, 82 N.H. at 573, 138 A. at 290.

Because we conclude that the legislature's decision to exempt bank interest and stock bank dividends from taxation under RSA chapter 77 was a valid classification under the New Hampshire Constitution, we need not engage in a discussion of the remaining two transferred questions raising State constitutional issues. We discern no allegation that the tax scheme treated taxpayers differently in any way except for the classification based upon payors of income. Accordingly, our determination that the classification of bank interest and stock bank dividends was a valid one under the State Constitution, supported by just reasons, concludes our analysis.

II. Federal Commerce Clause

The parties reserved the issue of remedy for the conceded commerce clause violation for the trial court. The State indicated in its pleadings before this court that fashioning a remedy "will require presentation of factual evidence and will include a resolution of such issues as (a) who will be entitled to relief, (b) what form that relief will take, and (c) severability of the statute." Given the complexity of this area of the law, we undertake a discussion of some of the cases to clarify the issues to be addressed on remand.

The commerce clause of the United States Constitution provides that "[t]he Congress shall have power . . . [t]o regulate Commerce . . . among the several states." U.S. CONST. art. I, § 8, cl. 3. "Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 98, 114 S. Ct. 1345, 1349, 128 L.Ed.2d 13 (1994); *see Associated Industries of Mo. v. Lohman*, 511 U.S. 641, 647, 114 S. Ct. 1815, 1820, 128 L.Ed.2d 639

(1994) (commerce clause prohibits regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors).

This construction supports the commerce clause's purpose "of preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Oklahoma Tax Com'n v. Jefferson Lines, Inc.*, 514 U.S. 175, ----, 115 S.Ct. 1331, 1335, 131 L. Ed. 2d 261 (1995). In this way, the provision

> reflects a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Id. ---- - ----, 115 S.Ct. at 1335-36 (quotation and brackets omitted). "The Commerce Clause does not, however, eclipse the reserved power of the States to tax for the support of their own governments, . . . rather, the Clause is a limit on state power." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328-29, 97 S.Ct. 599, 606, 50 L.Ed.2d 514 (1977) (quotation and citation omitted).

The Supreme Court has recognized that its decisions in this area present a "quagmire" of case law. *See American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266, 280, 107 S.

Ct. 2829, 2838, 97 L.Ed.2d 226 (1987). Several fundamental concepts remain constant, however, including the principle that "[n]o State, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business." *Boston Stock Exchange*, 429 U.S. at 329, 97 S.Ct. at 607 (quotation and ellipses omitted). State taxation of interstate commerce is not per se invalid. *See Maryland v. Louisiana*, 451 U.S. 725, 754, 101 S.Ct. 2114, 2133, 68 L. Ed.2d 576 (1981) (interstate commerce may be required to bear its share of the costs and services provided by the States); *Ky. Whip & Collar Co. v. I.C.R. Co.*, 299 U.S. 334, 349, 57 S.Ct. 277, 281-282, 81 L.Ed. 270 (1937) (States in the exercise of their police power may lawfully restrict interstate commerce in relation to their internal commerce). The commerce clause does, however, prohibit state taxes that discriminate against interstate commerce to the advantage of local business. "A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme[,] . . . to determine whether the statute under attack . . . will in its practical operation work discrimination against interstate commerce." *Maryland v. Louisiana*, 451 U.S. at 756 101 S.Ct. at 2134 (quotation omitted).

"[A] State may not discriminate between transactions on the basis of some interstate element." *Armco Inc. v. Hardesty*, 467 U.S. 638, 642, 104 S. Ct. 2620, 2622, 81 L.Ed.2d 540 (1984) (quotation omitted). In other words, "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Id.*; *see American Trucking Assns., Inc.*, 483 U.S. at 286, 107 S.Ct. at 2841 ("state tax that favors in-state business over out-of-state business for no other reason than the location of its business is prohibited by the Commerce Clause"). "Thus, States are barred from discriminating against foreign enterprises competing with local businesses, and from discriminating against commercial activity occurring outside the taxing State." *Oklahoma Tax Com'n*, 514 U.S. at ----, 115 S.Ct. at 1344 (citations omitted).

The Court applies "a virtually per se rule of invalidity to provisions that patently discriminate against interstate trade." *Associated Industries of Mo.*, 511 U.S. at 647, 114 S.Ct. at 1820 (quotation omitted). The Court has also recognized, however, that "a facially discriminatory tax may still survive Commerce Clause scrutiny if it is a truly 'compensatory tax' designed simply to make interstate commerce bear a burden already borne by intrastate commerce." *Fulton Corp.*, 516 U.S. at ----, 116 S.Ct. at 854 (quotation omitted). "[S]tate statutes that clearly discriminate against interstate commerce are routinely struck down, unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274, 108 S.Ct. 1803, 1808, 100 L.Ed.2d 302, (1988) (citations omitted).

Under the contemporary approach to the commerce clause, the Supreme Court applies what has become known as Complete Auto's four-part test: (1) whether there is a substantial nexus between the activity taxed and the taxing State; (2) whether the tax is fairly apportioned based, on the activity conducted in the taxing State; (3) whether the tax discriminates against interstate commerce; and (4) whether the tax is related to the services provided by the State. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287, 97

S.Ct. 1076, 1083, 51 L. Ed. 2d 326 (1977). Only the third factor, discrimination against interstate commerce, is relevant for the purposes of this case.

"'Discrimination' is not a self-defining term. It can be a delusively simple term, and once the question goes beyond the tax that is patently discriminatory on its face, much room for controversy about hidden discrimination exists." Tatarowicz & Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 Vand. L. Rev. 879, 885 (1986) (quotation omitted). A party who is challenging the constitutionality of a statute bears the burden of proof. *See Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 67 L.Ed. 1078 (1923); 16 Am.Jur.2d Constitutional Law § 251 (1979). In order to prove that a state tax statute violates the commerce clause, the taxpayer need not show the extent of disparate tax treatment or demonstrate a minimal level of discriminatory effect; the taxpayer need only prove discrimination against commerce. *See Maryland v. Louisiana*, 451 U.S. at 759-60, 101 S.Ct. at 2135-36. In this manner, the issues of constitutionality of the statute and remedy for its violation are separate. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 269, 277, 104 S. Ct. 3049, 3054, 82 L.Ed.2d 200 (1984).

The Supreme Court has defined discrimination to mean "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc.*, 511 U.S. at 99, 114 S.Ct. at 1350. A court will find discrimination if either the purpose of the legislation is to discriminate or if the effect of the legislation discriminates in favor of local interests. *See Bacchus Imports, Ltd.*, 468 U.S. at 270, 104 S.Ct. at 3054-

55. If the tax is discriminatory on its face, the court will look with the strictest scrutiny to determine whether the state law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Oregon Waste Systems, Inc.*, 511 U.S. at 101, 114 S.Ct. at 1347 (quotation omitted). The most common justification for legitimate discrimination is the compensatory tax which, in light of *Fulton Corp. v. Faulkner*, the State has conceded is not a valid defense in this case.

A taxing statute that nominally treats all trade alike might discriminate in practical operation against interstate commerce by providing local business with a competitive advantage. The Supreme Court has articulated some standards for determining whether a tax is discriminatory. In *Boston Stock Exchange*, 429 U.S. at 319, 97 S.Ct. at 601-02, the Court was asked to decide the constitutionality of an amendment to New York State's tax on securities transactions. The statute imposed a transfer tax on securities transactions so that transactions involving out-of-state sales were taxed more heavily than most transactions involving a sale within the State. *See id.* at 324-25, 97 S.Ct. at 604.

The Supreme Court used broad language in concluding that the tax was discriminatory. The Court stated that a tax is discriminatory if it provides "a direct commercial advantage to local business," *id.* at 329, 97 S.Ct. at 607 (quotation omitted), or if choices are "not made solely on the basis of nontax criteria," *id.* at 331, 97 S.Ct. at 607, or if the tax "forecloses tax-neutral decisions and creates both an advantage for the exchanges in New York and a discriminatory burden on commerce to its sister States," id. The tax is nondiscriminatory, on the other hand, insofar as the flow of commerce "was channeled neither into nor out of New York by the state tax." *Id.* at 330, 97 S.Ct. at 607 (footnote omitted). In response to the argument that the effect the statute might have on sales by residents and nonresidents did not amount to unconstitutional discrimination, the Court concluded that the large tax penalty for trading on out-of-state markets could not be deemed to have no practical effect on interstate commerce:

> Whatever the current inclinations of New York investors, the Clause protects out-of-state businesses from any discriminatory burden on their interstate commercial activities. Even if the tax is not now the sole cause of New York residents' refusal to trade on out-of-state exchanges, at the very least it reinforces their choice of an in-state exchange and is an inhibiting force to selling out of State; that inhibition is an unconstitutional barrier to the free flow of commerce.

Id. at 334 n.13, 97 S.Ct. at 609 n. 13..

In *Bacchus Imports, Ltd.*, 468 U.S. at 265, 104 S.Ct. at 3052, the Court reviewed a challenge to the constitutionality of the Hawaii liquor tax, which was a 20% excise tax imposed on sales of all liquor at wholesale regardless of whether the liquor was produced in-state or out-of-state. Specifically at issue were exemptions from the tax for certain locally produced alcoholic beverages: okolehao, a brandy distilled from the root of an indigenous shrub of Hawaii, and pineapple wine manufactured in the State. *Id.* The Court struck down the tax as violating the commerce clause, concluding that the exemption had both the purpose and the effect of discriminating in favor of locally produced products. *Id.* at 273.

Despite the fact that the tax exemption seemed to discriminate on its face against interstate commerce by bestowing a commercial advantage on okolehao and pineapple wine, Hawaii argued that there was no improper discrimination because okolehao and pineapple wine did not compete with the other products sold by the wholesalers. *Id.* at 268, 104 S.Ct. at 3053-54. The Supreme Court rejected this argument because the purpose of the exemption was to benefit the local products. *See id.* at 269, 104 S.Ct. at 3054. The only way that local liquors could be benefitted was if consumers switched from drinking other alcoholic beverages to the locally produced liquors, and the Court accordingly assumed that there was some competition between the local liquors and the nonexempted liquors. *Id.* The Court stated that

> neither the small volume of sales of exempted liquor nor the fact that the exempted liquors do not constitute a present "competitive threat" to other liquors is dispositive of the question whether competition exists between the locally produced beverages and foreign beverages; instead, they go only to the extent of such competition.

Id. (footnote omitted). On the stipulated facts of the case, the Court was "unwilling to conclude that no competition exist[ed] between the exempted and the nonexempted liquors." *Id.* The Court concluded that "as long as there is some competition between the locally produced exempt products and nonexempt products from outside the State, there is a discriminatory effect." *Id.* at 271, 104 S.Ct. at 3055. The Court also rejected Hawaii's argument that the purpose was not discriminatory because the legislature did not intend to hurt out-of-state businesses, but only to help the local wines. *Id.* at 273, 104 S.Ct. at 3056.

As the State has conceded in the case before us, the challenged exemptions facially discriminate against interstate commerce because interest and dividend income earned on investments in out-of-state banks is taxed while interest and dividend income earned on investments in New Hampshire banks remains untaxed. New Hampshire residents have a strong economic incentive to invest in banks located within the State. Under Supreme Court cases set out in this opinion, the tax discriminates against interstate commerce to the direct competitive advantage of New Hampshire banks. The tax's distinction between in-state and out-of-state banks is unconstitutional because a New Hampshire depositor's decision about whether to invest in a domestic or foreign bank is not governed by tax-neutral criteria. This violates the principle that state statutes may not constitutionally encourage the development of local industry by means of taxing measures that impose greater burdens on economic activities taking place outside the State than would be placed on similar activities within the State. *See Boston Stock Exchange, Inc.*, 429 U.S. at 329, 97 S.Ct. at 606-07.

In fashioning a remedy, however, the trial court must determine whether the petitioners can prove their claim that the effect of the exemptions for New Hampshire bank interest and dividends was to discriminate unlawfully against other sources of interest and dividend income, as opposed to discriminating solely against income earned on investments in out-of-state banks, as the State maintains. The negative commerce clause is intended to preserve free market competition. If there has been no actual effect on the market because New Hampshire bank interest and dividends do not compete with other corporate investments, then the Federal Constitution has not been violated as to entities other than out-of-state banks. *Cf. General Motors Corp. v. Tracy*, 519 U.S. 278, ----, 117 S.Ct. 811, 823-24, 136 L.Ed.2d 761 (1997). In order to determine the extent of the discrimination in this case, the trial court must make a factual determination whether New Hampshire bank interest and dividends compete with other sources of investment income such as stock dividends and bond interest. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126, 98 S.Ct. 2207, 2214, 57 L.Ed.2d 91 (1978) (law had no demonstrable effect whatsoever on the interstate flow of goods). The petitioners must offer evidence to support "a precise determination of the extent of the discrimination." *Maryland v. Louisiana*, 451 U.S. at 759-60, 101 S.Ct. at 2136; *see Government Suppliers Consolidating Serv. v. Bayh*, 975 F.2d 1267, 1279 (7th Cir. 1992) (although law did not facially discriminate against interstate commerce, factual findings as to actual effect on interstate commerce led to conclusion that statute violated commerce clause); *see generally* Schoettle, *Commerce Clause Challenges to State Taxes*, 75 Minn. L. Rev. 907 (1991) (emphasizing the importance of examining the effect of a tax on interstate commerce).

"If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the

State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *McKesson Corp.*, 496 U.S. at 31, 110 S.Ct. at 2247 (footnotes omitted). The State retains flexibility in remedying an impermissibly discriminatory tax.

> [A] State might refund the additional taxes imposed upon the victims of its discrimination or, to the extent consistent with other constitutional provisions (notably due process), retroactively impose equal burdens on the tax's former beneficiaries. A State may also combine these two approaches. These options are available because the Constitution requires only that the resultant tax actually assessed during the contested period reflect a scheme that does not discriminate against interstate commerce.

Fulton Corp., 516 U.S. at ----, 116 S.Ct. at 861 (citation, quotation, and brackets omitted). "The State is free to choose which form of relief it will provide." *McKesson Corp.*, 496 U.S. at 51, 110 S.Ct. at 2258.

III. Equal Protection

Because the State concedes that the commerce clause applies and was violated in the instant case, we need not engage in a separate analysis under the equal protection clause. *See Bacchus Imports, Ltd.*, 468 U.S. at 273 n.11, 104 S.Ct. at 3056 n. 11; *Blue Jay Realty Trust v. City of Franklin*, 132 N.H. 502, 509, 567 A.2d 188, 193 (1989); *cf. General Motors Corp.*, 519 U.S. at ----, 117 S.Ct. 811 ("[I]n some peculiar circumstances state tax classifications facially discriminating against interstate commerce may violate the Equal Protection Clause even when they pass muster under the Commerce Clause.").

Remanded.

All concurred.

APPENDIX D

THE STATE OF NEW HAMPSHIRE
Merrimack County Superior Court
163 N. Main Street
P. O. Box 2880
Concord, NH 03301 2880
603 225-5501

[Filed March 4, 1999]

NOTICE OF DECISION

MICHAEL C HARVELL ESQ
SHEEHAN PHINNEY BASS & GREEN P A
PO BOX 3701
MANCHESTER NH 03105-3701

95-E-0059 Ernest T. Smith, III, et al v State of NH Dept. Revenue, et al
95-E-0082 Estate of Robert P. Burroughs v State of NH Dept. Revenue
95-E-0063 Robert A. Wells, Exec. Kendall Estate v NH Dept. Revenue, et al
95-E-0092 John R. McLane, Jr., et al v NH Dept. of Revenue Admin., et al
95-E-0091 Kurt M. Swenson, et al v NH Dept. of Revenue Admn., et al
95-E-0128 Howard F. Nichols, et al v State of NH Dept. of Revenue, et al
95-E-0129 Alexander A. Courtney, et al v NH Dept. of Revenue, et al

Notice of Decision with Attachments and Exhibits - 3/4/99

95-E-0136 Margaret M. Straw v State of NH Dept. of Revenue Admin. et al

Enclosed please find a copy of the Court's Order dated 3/04/99 relative to:

Ord-Motion for Class Action
Scheduling Order

03/04/99

William McGraw
Clerk of Court

cc: Russell F. Hilliard, Esq.
Christopher P. Reid, Esq.
Martin P. Honigberg, Esq
Wilbur A. Glahn, III, Esq.
W. Wright Danenbarger, Esq.

Notice of Decision with Attachments
and Exhibits - 3/4/99

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

ERNEST T. SMITH, III et al.

v.

N.H. DEPARTMENT OF REVENUE
ADMINISTRATION et al.

Docket No. 95-E-059

PROPOSED SCHEDULING ORDER

The following Schedule is hereby ordered:

1. Class Notices to be mailed - March 31, 1999.

2. Opt-Out Deadline - April 30, 1999.

3. Plaintiff's Rebuttal Expert Disclosure - June 1, 1999.

4. State's Rebuttal Expert Disclosure - August 1, 1999.

November 1,
5. Close of Discovery-~~September 15~~, 1999.

is for December 6, 1999.
6. Trial~~-to be~~ scheduled ~~after October 15, 1999~~.

7. Trial memos must be filed by November 29, 1999.

8. Pretrial conference is scheduled for November 29, 1999 at 1:00 pm at which time counsel shall mark exhibits.

Dated this ______ day of ____________, 1999.

By the Court:

/s/______________________
Kathleen A. McGuire
Presiding Justice
3/4/99

Notice of Decision with Attachments and Exhibits - 3/4/99

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

ERNEST T. SMITH, III et al.

v.

N.H. DEPARTMENT OF REVENUE ADMINISTRATION et al.

Docket No. 95-E-059

[AMENDED PROPOSED] ORDER APPROVING CERTIFICATION OF CLASS ACTION

WHEREAS the action entitled Ernest T. Smith, III et al. v. N.H. Department of Revenue Administration et al., Docket No. 95-E-059, was filed in several superior courts in 1995 by several taxpayers who had paid an Interest and Dividends Tax pursuant to NH RSA 77:1 et seq. for the years 1991-94, and it was then consolidated in Merrimack County Superior Court and specially assigned to the Honorable Kathleen McGuire (the "Consolidated Actions); and

WHEREAS on November 25, 1998, the parties to the Consolidated Actions, including the State, entered into a Stipulation Regarding Certification of Class Action and Dismissal of Certain Claims ("Stipulation"), after extensive negotiations, that has been approved by the Court, calling for, among other things the certification of this action as a class action under Superior Court Rule 27-A; and

WHEREAS as a result of the foregoing negotiations the parties have filed in this action an Assented-to Motion for Class Certification proposing that the following notices of the Certification of this Class Action be given:

Attachment 1: Notice of Pendency of Class Action ("Notice") and

Attachment 2: Summary Notice of Pendency of Class Action ("Summary Notice"); and

WHEREAS the Court has considered the documents described above, including the Stipulation, the Assented-to Motion for Class Certification, all exhibits attached thereto, and all of the pleadings, papers, and filings herein and conducted a hearing on March 4, 1999; and

WHEREAS the terms used herein shall have the same meaning as defined in the Assented-to Motion for Class Certification, which is incorporated herein by reference; and

WHEREAS good cause appearing therefor,

IT IS ORDERED AS FOLLOWS:

1. The Court finds that the Class as defined in the Stipulation satisfies the criteria of Superior Court Rule 27-A and therefore orders that the following class (the "Class") be certified under Rule 27-A:

> "All taxpayers who have paid an interest and dividend tax under NH RSA 77:1 et seq. for

> any of the tax years 1991 through 1994 and who have timely filed and properly preserved their refund claims with the Department of Revenue Administration under applicable New Hampshire law."

Specifically, pursuant to Superior Court Rule 27-A, the Court finds that: (i) the Class is so numerous that joinder of all members is impracticable; (ii) there are questions of law or fact common to the Class; (iii) the claims or defenses of the representative parties are typical of the claims or defenses of the Class; (iv) the representative parties will fairly and adequately protect the interests of the Class; (v) a class action is superior to other available methods for the fair and efficient adjudication of this controversy; and (vi) the attorney steering committee will adequately represent the interest of the Class. The Class representatives shall be the above-captioned Plaintiffs. Counsel for the Class shall be the counsel who are members of the steering committee of the Consolidated Actions.

2. Pending resolution of these proceedings, no Class Member who does not opt out of this action shall commence or prosecute, either directly or through another person or entity, any action or proceeding in any court or tribunal asserting any of the claims made by this action against the State of New Hampshire.

3. The Notice and the Summary Notice, annexed hereto as Attachment 1 and Attachment 2, are approved by this Court. The rights of Class Members to opt out are as provided in the Notice and Summary Notice.

4. In accordance with its responsibilities set forth in the Stipulation, the State of New Hampshire is hereby directed to:

(a) mail or caused to be mailed, as soon as practicable but no later than March 30, 1999, to each Class Member in care of the agent appointed in his power of attorney on file with the Department of Revenue Administration or, if none is on file, at the address shown on the taxpayer's refund claim, a copy of the Notice; and

(b) cause the Summary Notice to be published twice in The Manchester Union Leader within thirty (30) days of the date of this order and within ten (10) days of the mailing of the notice referenced in paragraph 4(a).

5. Pursuant to Superior Court Rule 27-A, this Court hereby finds and concludes that the form and manner of giving notice by the mailing and publication required by this order is, under the circumstances, the best practicable notice to all Class Members. Such notice procedure provides due and sufficient notice to all persons entitled to such notice; and such notice procedure fully satisfies the requirements of Superior Court Rule 27-A and the requirements of constitutional due process.

6. On or before April 30, 1999, the date fixed by this Court for any Class Members to opt out, Counsel for the State of New Hampshire shall cause to be filed with the Clerk of the Court and served upon Class Counsel, affidavits or declarations of the persons under whose general direction the mailing of the Notice and publication of the Summary Notice

shall have been prepared and made, showing that such mailing and publication have been made in accordance with this order.

7. Any Member of the Class who opts out prior to April 30, 1999 may file an appeal of the State's action on his refund request at his own expense.

Dated this 4th day of March, 1999.

By the Court:

/s/

Kathleen A. McGuire
Presiding Justice

ATTACHMENT 1
TO ORDER APPROVING CERTIFICATION OF CLASS ACTION

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

ERNEST T. SMITH, III et al.

v.

N.H. DEPARTMENT OF REVENUE ADMINISTRATION et al.

Docket No. 95-E-059

NOTICE OF PENDENCY OF CLASS ACTION

THIS NOTICE MAY AFFECT YOUR RIGHTS
PLEASE READ IT CAREFULLY

TO: ALL PERSONS WHO ARE OR WERE TAXPAYERS WHO HAVE PAID AN INTEREST AND DIVIDEND TAX UNDER NH RSA 77:I ET SEQ. FOR ANY OF THE TAX YEARS 1991-1994 AND WHO HAVE TIMELY FILED AND HAVE PROPERLY PRESERVED THEIR REFUND CLAIMS WITH THE NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION

Notice of Decision with Attachments
and Exhibits - 3/4/99

1. WHY ARE YOU RECEIVING THIS NOTICE?

You are receiving this Notice to advise you of certain claims made on your behalf in a class action lawsuit styled Ernest T. Smith, III et al. v. N.H. Department of Revenue Administration et al., Docket No. 95-E-059, that is pending against the State of New Hampshire in Merrimack County Superior Court. This Notice describes the class action and advises you of your rights in connection with this Class Action. All Class members who do not exclude themselves from the Class on a timely basis (as described below) will be bound by the orders issued by the Court regarding this Action.

PLEASE PRESERVE YOUR FINANCIAL RECORDS RELATING TO THE INCOME REPORTED IN YOUR INTEREST AND DIVIDEND TAX RETURNS FOR THE YEARS 1991 TO 1994.

You should carefully read this entire Notice before making any decision regarding the class action lawsuit. This Notice is given to you pursuant to an Order of the New Hampshire Superior Court.

2. WHAT IS A CLASS ACTION?

Class actions are lawsuits in which the claims and rights of many people are decided in a single court proceeding. Representative plaintiffs ("Class Representatives") are named in the lawsuit to assert the claims of the entire class. This avoids the necessity for a large number of people to file similar individual lawsuits and enables the court system to resolve similar claims in an efficient and economical way. Class actions assure that people with similar claims are treated alike. In a class action, the court is guardian of class interests and supervises the prosecution of the class claims by Class Counsel to assure that the representation is adequate. Class members are not individually responsible for the costs or fees of counsel, which are subject to court award, usually out of the proceeds of the class action except as they have entered into individual fee agreements.

3. DESCRIPTION OF THE LAWSUIT.

In this Lawsuit, Class Representatives acting on behalf of the proposed class have challenged the State's exemption of New Hampshire bank interest and dividends from taxation under the Interest and Dividends Tax Statute, NH RSA 77:1 et seq. as a violation of the Commerce Clause of the United States Constitution and seek refunds of taxes paid by the Class from 1991-94. That exemption was repealed in 1995. In essence, the Plaintiffs claim that the exemption, which favored New Hampshire banks at the expense of out-of state business interests, whose interest and dividend payments are taxed to the recipients, violated the Commerce Clause because it discriminated against interstate commerce, which the Commerce Clause forbids.

In this case, the New Hampshire Supreme Court has held that the tax and exemption in fact violated the Commerce Clause, and has remanded the case to the Superior Court for a finding as to the extent of discrimination against interstate commerce by determining what investments, if any, competed with New Hampshire bank investments yielding interest and dividends. The State has conceded that out-of-state bank interest and dividends competed with New Hampshire bank interest and dividends. It is therefore likely that the Court will ultimately order a remedy at least with respect to taxes paid on out-of-state bank interest and dividends received by Class Members during the tax years 1991-94, although the State has not yet proposed any such remedy. A determination of the extent of competition, and therefore discrimination, will be made by the Court following an evidentiary hearing. Thereafter, it is expected that the State will propose a remedy for those taxpayers found to have been unconstitutionally taxed, which remedy may or may not also be challenged by this Class Action lawsuit. That remedy might include a refund, a credit against future taxes or other remedies.

The Plaintiffs and the State of New Hampshire have agreed, and the Superior Court has found, that a class action is the most fair and efficient way to conduct the adjudication of this matter and that all taxpayers found to have been unconstitutionally taxed and who properly preserved their claims will receive the same remedy. As part of this Agreement, the Class Counsel have agreed to withdraw with prejudice any claim that the exemption from interest and dividends tax of New Hampshire State and municipal bond obligations is in violation of the Commerce Clause. **If you remain a member of the Class you will be barred from asserting that the State and municipal bond exemption for the years in question was unconstitutional.**

4. WHO IS IN THE CLASS?

Pursuant to Superior Court Rule 27-A and an Order of the Court dated 3/4/99, 1999, the Court has authorized this Notice to be sent to members of the Class who have been identified from the records of the State of New Hampshire. The Class shall consist of:

> ALL TAXPAYERS WHO HAVE PAID AN INTEREST AND DIVIDEND TAX UNDER NH RSA 77:1 ET SEQ. FOR ANY OF THE TAX YEARS 1991 THROUGH 1994 AND WHO HAVE TIMELY FILED AND PROPERLY PRESERVED THEIR REFUND CLAIMS WITH THE DEPARTMENT OF REVENUE ADMINISTRATION.

5. WHO REPRESENTS THE CLASS?

A steering committee consisting of the following law firms and lawyers is representing the Class:

Lead Class Counsel:

Michael C. Harvell, Esquire
James Q. Shirley, Esquire
SHEEHAN PHINNEY BASS + GREEN,
PROFESSIONAL ASSOCIATION
1000 Elm Street
P.O. Box 3701
Manchester, NH 03105-3701
(603) 668-0300

Notice of Decision with Attachments and Exhibits - 3/4/99

Steering Committee Members:

David E. Barradale, Esquire
ANSELL PROFESSIONAL ASSOC.
40 South River Road
Bedford Place, Unit 32
Bedford, NH 03110

W. Wright Danenbarger, Esquire
WIGGIN & NOURIE, PA
20 Market Street
PO Box 808
Manchester, NH 03105-0808

David L. Dubrow, Esquire
RATH YOUNG & PIGNATELLI, PA
One Capital Plaza
PO Box 1500
Concord, NH 03302

Wilbur A. Glahn, III, Esquire
MCLANE GRAF RAULERSON &
MIDDLETON, PROFESSIONAL
ASSOCIATION
900 Elm Street
PO Box 326
Manchester, NH 03105

Russell F. Hilliard, Esquire
UPTON SANDERS & SMITH
PO Box 1090
Concord, NH 03302

6. OPTIONS OF CLASS MEMBERS

IF YOU ARE A CLASS MEMBER, YOU HAVE THE FOLLOWING OPTIONS:

a. You can remain a class member by doing nothing. If you do nothing in response to this Notice, you will automatically become a member of the Class, and be bound by the determination made as a result of this lawsuit and you may receive a remedy, if any, as yet undetermined, with respect to all or a portion of the tax which you paid on interest and dividends to the State of New Hampshire for the years 1991-1994 depending on the determinations made by the Court.

b. You can request exclusion from the Class. If you choose to be excluded from the Class you will not be bound by any judgment or other final disposition of this Lawsuit. You will retain any claims for a remedy for the payment of an unconstitutional interest and dividend tax you might currently have by virtue of filing a refund claim with the Department of Revenue Administration, but will have to pursue it on your own. To request exclusion you must state in writing your desire to be excluded from the Class by signing and filing the attached Notice of Exercising Opt Out Option and mailing it by first class mail postmarked on or before April 30, 1999. The executed Notice of Exercising Opt Out Option must be filed with the Clerk of Court, Merrimack County Superior Court, 163 North Main Street, PO Box 2880, Concord, NH 03301-2880, with a copy to the Lead Class Counsel identified in paragraph 5 above, and Counsel for the State, identified in the Notice of Exercising Opt-Out Option.

If the request is not postmarked on or before April 30, 1999, your request for exclusion will be invalid and you will be included in the Class automatically, bound by the final judgment and barred from bringing any individual claim for relief apart from this litigation.

7. ADDITIONAL INFORMATION

This Notice is only a summary. The pleadings filed in the Lawsuit can be requested, in writing, from any of the Class Counsel identified in Paragraph 5 above, or can be inspected and copied, during normal business hours, at the office of the:

Clerk of Court
Merrimack County Superior Court
163 North Main Street
Concord, NH 03301

File: Ernest T. Smith, III et al. v. N.H. Department of Revenue Administration et al., Docket No. 95-E-059.

ALL QUESTIONS ABOUT THIS NOTICE, OR THE CLASS ACTION SHOULD BE DIRECTED TO LEAD CLASS COUNSEL IDENTIFIED IN PARAGRAPH 5 ABOVE. PLEASE DO NOT CALL OR WRITE THE COURT OR THE CLERK'S OFFICE FOR INFORMATION.

Dated: 3/4, 1999

Clerk /s/__________________
Merrimack County
Superior Court

ATTACHMENT 2

TO ORDER APPROVING CERTIFICATION OF CLASS ACTION

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

ERNEST T. SMITH, III et al.

v.

N.H. DEPARTMENT OF REVENUE ADMINISTRATION et al.

Docket No. 95-E-059

SUMMARY NOTICE OF PENDENCY OF CLASS ACTION

TO: ALL PERSONS WHO ARE OR WERE TAXPAYERS WHO HAVE PAID AN INTEREST AND DIVIDEND TAX UNDER NH RSA 77:1 ET SEQ. FOR ANY OF THE TAX YEARS 1991-1994 AND WHO HAVE TIMELY FILED AND PROPERLY PRESERVED THEIR REFUND CLAIMS WITH THE NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION

YOUR RIGHTS MAY BE AFFECTED BY THE FOLLOWING CERTIFICATION OF CLASS.

Notice of Decision with Attachments and Exhibits - 3/4/99

PLEASE READ CAREFULLY

YOU ARE HEREBY NOTIFIED, pursuant to Rule 27-A of the Superior Court Rules, and an order of the Merrimack County Superior Court, of the certification of a Class Action consisting of the following members:

> "All taxpayers who have paid an interest and dividend tax under NH RSA 77:1 et seq. for any of the tax years 1991 through 1994 and who have timely filed and properly preserved their refund claims with the Department of Revenue Administration under applicable New Hampshire law."

If you are or were a New Hampshire interest and dividend taxpayer for the years 1991-1994 and timely filed and properly preserved a refund claim for such taxes in any of those years, you may be a Member of the Class and, if so, your rights may be affected by this case.

Members of the Class have the right to opt out of Membership in the Class provided for in this case by filing with the Merrimack County Superior Court, 163 North Main Street, PO Box 2880, Concord, NH 03301-2880, post-marked on or before April 30, 1999, the Notice attached hereto as Exhibit A. In such event, the Class Member will not receive any of the proceeds of this case and will be free to litigate any claims which he or she may have against the State of New Hampshire for such tax refunds. **The failure to file the Opt-out Notice post-marked on or before April 30, 1999 will forever bar a Class Member from opting out of the Class.**

Notice of Decision with Attachments and Exhibits - 3/4/99

Based upon its computerized records, the State of New Hampshire is sending a more detailed notice to each taxpayer whom the State of New Hampshire has identified as being a Class Member (the "Notice"). If you believe you are a Member of the Class and have not received such a notice in the mail, you may obtain a copy of the Notice by writing to Interest and Dividends Tax Litigation, Michael C. Harvell, Esquire, Sheehan Phinney Bass + Green, Professional Association, 1000 Elm Street, P.O. Box 3701, Manchester, NH 03105-3701.

Dated: 3/4, 1999

/s/
Clerk
Merrimack County
Superior Court
163 North Main Street
PO Box 2880
Concord, NH 03301-2880

EXHIBIT A
TO NOTICE OF PENDENCY OF CLASS ACTION

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

ERNEST T. SMITH, et al.

v.

N.H. DEPARTMENT OF REVENUE ADMINISTRATION et al.

Docket No. 95-E-059

NOTICE OF EXERCISING OPT OUT OPTION

The undersigned, believing himself or herself to be a Member of the Class certified in the above-captioned matter, hereby exercises his or her right to opt out of the Class, understanding that the exercise of such option will bar the undersigned from participating in the proceeds of that litigation and will exclude the undersigned from being bound by the findings of the Court in the above-captioned matter.

Respectfully submitted,

____
Signature

____
Print Name

____
____
____
Print Address

If you choose to opt out of the class action you should sign this form and return it to:

Clerk of Court
Merrimack County Superior Court
163 North Main Street
PO Box 2880
Concord, NH 03301-2880

post-marked on or before April 30, 1999, with a copy to:

Lead Class Counsel:

Michael C. Harvell, Esquire
James Q. Shirley, Esquire
SHEEHAN PHINNEY BASS + GREEN,
PROFESSIONAL ASSOCIATION
1000 Elm Street
P.O. Box 3701
Manchester, NH 03105-3701

and

Counsel for the State:

Martin Honigberg, Esquire
Senior Assistant Attorney General
Office of the Attorney General
33 Capitol Street
Concord, NH 03301

EXHIBIT A

TO SUMMARY NOTICE OF PENDENCY OF CLASS ACTION

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

ERNEST T. SMITH, III et al.

v.

N.H. DEPARTMENT OF REVENUE ADMINISTRATION et al.

Docket No. 95-E-059

NOTICE OF EXERCISING OPT OUT OPTION

The undersigned, believing himself or herself to be a Member of the Class certified in the above-captioned matter, hereby exercises his or her right to opt out of the Class, understanding that the exercise of such option will bar the undersigned from participating in the proceeds of that litigation and will exclude the undersigned from being bound by the findings of the Court in the above-captioned matter.

Respectfully submitted,

____
Signature

____
Print Name

____
____
____
Print Address

If you choose to opt out of the class action you should sign this form and return it to:

Clerk of Court
Merrimack County Superior Court
163 North Main Street
PO Box 2880
Concord, NH 03301-2880

post-marked on or before April 30, 1999, with a copy to:

Lead Class Counsel:

Michael C. Harvell, Esquire
James Q. Shirley, Esquire
SHEEHAN PHINNEY BASS + GREEN, PROFESSIONAL ASSOCIATION
1000 Elm Street
P.O. Box 3701
Manchester, NH 03105-3701

and

Counsel for the State:

Martin Honigberg, Esquire
Senior Assistant Attorney General
Office of the Attorney General
33 Capitol Street
Concord, NH 03301

APPENDIX E

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

ERNEST T. SMITH, III et al.

v.

N.H. DEPARTMENT OF REVENUE
ADMINISTRATION et al.

Docket No. 95-E-059

PLAINTIFFS' REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW

NOW COME the undersigned Class Counsel and submits the following Plaintiffs' Requests for Findings of Fact and Rulings of Law.

I. INTRODUCTION

This class action arises from the Plaintiff taxpayers' payment of Interest and Dividends tax during 1991-1994 as required by the version of R.S.A. 77 ("RSA 77") then in effect. RSA 77 imposed a 5% tax on all interest and dividends paid on investments made by individuals, trusts, estates and certain partnerships, but expressly exempted from this tax: (1) interest paid on instruments issued by New Hampshire banks; and (2) dividends paid on stock issued by New Hampshire banks. The Plaintiffs brought this suit, claiming that RSA 77 was unconstitutional. Following transfer to the New Hampshire Supreme Court, the Court found that RSA 77 discriminated against interstate commerce in violation of the Federal Commerce Clause. See Smith v. N.H. Dep't of Revenue Admin., 141 N.H. 681,692 A.2d 486 (1997).

The Smith Court remanded this case for a trial limited to "a factual determination of whether New Hampshire bank interest and dividends compete with other sources of investment income such as stock dividends and bond interest." Smith, 141 N.H. at 696, 692 A.2d at 497.

The Plaintiffs submit the following Requests for Findings of Fact concerning the Plaintiffs' payment of Interest and Dividends taxes pursuant to RSA 77, the nature of New Hampshire bank stock and deposit products and the taxed Financial Investments (defined in Plaintiffs' Post-Trial Memorandum, p.2) at issue, the competition between such bank stock and deposit products and the taxed interstate investments, and evidence at trial concerning these issues. The Plaintiffs submit the following Requests for Rulings of Law regarding the appropriate standard for this Court's determination that there was competition between the favored local investments and the taxed interstate investments, and hence RSA 77's impermissible discrimination extended to all such competitive investments.

II. REQUESTS FOR FINDINGS OF FACT

A. The Provisions of RSA 77 in Effect During 1991-1994

1. From 1991 through 1994, RSA 77 imposed a 5%tax on all interest and dividends paid on investments made by individuals, trusts, estates and certain partnerships. G

2. From 1991 through 1994, RSA 77 expressly exempted from the interest and dividends tax any (1) interest paid on instruments issued by New Hampshire banks and (2) dividends paid on stock issued by New Hampshire banks which were not owned by holding companies. G

B. From 1991 through 1994, the Plaintiffs Paid Interest and Dividends Tax Pursuant to RSA 77

3. The Plaintiff class members in this class action include New Hampshire residents who earned interest and dividend income from various sources. **[Straw Direct, Day 1, 5/22/00 a.m. session; Plaintiffs' Ex. 1A-E and 2A-D; Wells Direct, 5/22/00, a.m. session; Plaintiffs' Ex. 3A-F and 4A-E; Plaintiffs' Ex. 7A-D and 8A-E]**. G

4. Plaintiff Margaret Straw owned a variety of investments including equities, bonds and cash equivalents. **[Straw Direct, Day 1, 5/22/00, a.m. session; Plaintiffs' Ex. 1 A-E and 2A-D]**. G

5. Plaintiff Estate of Helen Kendall owned a variety of investments including equities, bonds and cash equivalents. **[Wells Direct, Day 1, 5/22/00, a.m. session; Plaintiffs' Ex. 3A-F and 4A-E]**.

G

6. Plaintiff Kurt M. Swenson, Trustee of the Swenson A Trust owned a variety of investments including equities, bonds and cash equivalents **[See Plaintiffs' Ex. 7A-D and 8A-E]**.

G

7. The Plaintiffs paid state taxes on their respective earned interest and dividends during 1991-1994 as required by the provisions of RSA 77. **[Straw Testimony, Day 1, 5/22/00 a.m. session; Plaintiffs' Ex. 1A-E and 2A-D; Plaintiffs' Ex. 3A-F and 4A-E; Plaintiffs' Ex. 7A-D and 8A-E]**.

G

8. Attached as Exhibit A is a schedule which shows the nature and amount of the Representative Plaintiffs' interest and dividend income during 1991-1994 and the tax paid.

G

9. Plaintiff Margaret Straw paid Interest and Dividends taxes of $7,219 in 1991, $7,430 in 1992, $6,918 in 1993, and $7,169 in 1994. **[See Exhibit A attached hereto; Plaintiffs' Ex. 1A-E and 2A-D]**.

G

10. Plaintiff Estate of Helen Kendall paid Interest and Dividends taxes of $1,271 in 1991, $2,170 in 1992, $1,841 in 1993, and $1,661 in 1994. **[See Exhibit A attached hereto; Plaintiffs' Ex. 3A-F and 4A-E]**.

G

11. Plaintiff Kurt M. Swenson, Co-Trustee of the Katherine M. Trust A paid Interest and Dividends taxes of $1,407 in 1991, $969 in 1992, $1,052 in 1993, and $1,060 in 1994. **[See Exhibit A attached hereto; Plaintiffs' Ex. 7A-D and 8A-D].** G

12. Plaintiff Kurt M. Swenson, Co-Trustee of the Kneeland Swenson Family Trust, paid interest and dividends taxes of $108 in 1991, $61 in 1992, $41 in 1992 and $52 in 1994. **[See Exhibit A attached hereto; Plaintiffs' Ex. 7A-D and 8A-D].** G

13. Plaintiff Kurt M. Swenson, Co-Trustee of the Kneeland Swenson Marital Trust, paid interest and dividends taxes of $1,576 in 1991, $1,291 in 1992, $1,232 in 1992 and $1,270 in 1994. **[See Exhibit A attached hereto; Plaintiffs' Ex. 7A-D and 8A-D].** G

C. The State Concedes that the RSA 77 Exemptions at Issue Violate the Commerce Clause of the U.S. Constitution

14. Prior to the New Hampshire Supreme Court's decision in the Smith case, the Respondent New Hampshire Department of Revenue ("the State") conceded that the exemptions set forth in RSA 77 which are at issue in this case violated the Commerce Clause of the U.S. Constitution. (Smith, at 684). G

15. The State has conceded that the former exemptions in RSA 77 violated the Commerce Clause of the

United States Constitution. **[See Exhibit B, attached hereto, Statement of the Issue in Dispute]**. G

D. All Types of Financial Investments are Affected by RSA 77, Including Local Favored Investments and Taxed Interstate Investments

16. During 1991-1994, New Hampshire "bank source income" was exempt from taxation under RSA 77. G

17. "Bank source income" includes dividends issued by banks on their common stock, checking account interest, savings account interest, money market funds paid by New Hampshire banks, and certificates of deposit ("CDs). **[Plaintiffs' Ex. 10 3/16/98 Logue Report, p. 3; Logue Direct, Day 2, 5/23/00, a.m. session]** G

18. Bank CDs are part of a class of assets termed money market assets or cash equivalents. **[Plaintiffs' Ex. 10, 3/16/98 Logue Report, p. 2; Hebert Direct, Day 1, 5/22/00 p.m. session]** G

19. Money Market instruments include domestic bank CDs including New Hampshire bank CDs, CDs offered by U.S. banks located abroad, CDs issued by foreign banks located within the United States, Bankers' Acceptances, Commercial Paper, and near maturity securities issued by the U.S. Treasury and by U.S. Government Agencies. **[Plaintiffs' Ex. 10; 3/16/98 Logue Report, p. 4; Logue Direct, Day 2, 5/23/00, a.m. session]** G

20. Large Money Market Funds hold bank CDs in their own portfolios. **[Plaintiffs' Ex. 10, 3/16/98 Logue Report, p. 3]** G

21. New Hampshire bank interest-generating accounts that were free from taxation under the Interest and Dividends Tax from 1991 through 1994 included NOW Accounts, passbook savings accounts, various certificates of deposit with different maturity dates and money market products (which may include investments in treasury securities, commercial paper and bankers' acceptances). **[Logue Direct, Day 2, 5/23/00, a.m. session]** G

22. RSA 77 taxed interest and dividends received by New Hampshire residents income from all sources, except New Hampshire and Vermont banks, as further described on Plaintiffs' Ex. 9A-9C. G

E. Tested and Accepted Financial Doctrine Places New Hampshire Bank Deposit Products and Bank Stock In Competition With Interest-and Dividend-Bearing Investment Assets on Which The Interest and Dividends Tax Was Paid

23. Modern Portfolio Theory provides a framework for investment decisions and is generally accepted in financial, governmental and academic circles. **[Logue Direct, Day 2, 5/23/00, a.m. session]** G

24. Modern Portfolio Theory explains how markets behave and correlates the relationship between higher rates of return and increased risk, while also emphasizing the

advantages associated with diversification. **[Logue Direct, Day 2, 5/23/00, a.m. session]** G

25. The financial community relies heavily on the Modern Portfolio Theory, which has been validated empirically. **[Logue Direct, Day 2, 5/23/00 a.m. session]** G

26. An underlying premise of the Modern Portfolio Theory is that every asset that competes in the market has to be held by an investor. If the asset does not compete sufficiently well to be held by an investor, then it would not exist. **[Logue Direct, Day 2, 5/23/00, a.m. session]** G

27. The "Efficient Frontier" is an economic concept which plots portfolios of investments in relation to their expected return and their risk; it identifies those portfolios which maximize return for a given risk or minimize risk for a given return. **[Logue Direct, Day 2, 5/23/00, a.m. session]** G

28. The Efficient Frontier represents the relationship between higher rates of return and increased risk, and assumes that investors will take the least risk necessary in order to earn the highest rate of return. **[Logue Direct, Day 2, 5/23/00, a.m. session]** G

29. An investment portfolio will be in the Efficient Frontier if its expected return is maximized to the greatest extent possible and the investment portfolio's risk is minimized to the greatest extent possible. **[Logue Direct Day 2, 5/23/00, a.m. session]** G

30. As investors' objectives change, due to demographics or expectations, investors often sell assets to buy other assets to move their portfolios along the Efficient Frontier. **[Logue Direct, Day 2, 5/23/00, a.m. session]** G

31. Under the concept of arbitrage, every financial instrument is traded as a reaction to how all other financial instruments behave, and transactions will occur to cause prices to change until risk-adjusted return of the asset is competitive. **[Logue Direct, Day 2, 5/23/00, a.m. session]** G

32. The Efficient Frontier applies to New Hampshire investors. **[Logue Direct, Day 2, 5/23/00, a.m. session]** G

33. New Hampshire investors are rational investors who make investment portfolio decisions based on expected return and risk. **[Logue Direct, Day 2, 5/23/00, a.m. session]** G

34. Rational investors, including New Hampshire investors, analyze investments net of taxes. **[Logue Direct, Day 2, 5/23/00, a.m. session]** G

35. New Hampshire bank products fall within the broad spectrum of financial instruments under the Modern Portfolio Theory. **[Logue Direct, Day 2, 5/23/00, a.m. session]** G (Consistent with Court's Order)

36. A fundamental principle of Modern Portfolio theory is that all financial assets compete with each other. **[Logue Direct, Day 2, 5/23/00, p.m. session]**

G (Consistent with Court's Order)

37. Based upon the Modern Portfolio Theory and the manner in which investors transferred funds among and between asset classes, investors considered all Financial Investments, including New Hampshire bank depository products and bank stock, to be in competition for their dollars.

D

F. There is an Integrated Global Marketplace for Financial Investments, Including the Local Favored Investments and the Taxed Interstate Investments

38. Interest rates on CDs, including CDs that can be traded, change as general credit conditions change, **[Plaintiffs' Ex. 10, 3/16/98 Logue Report, p. 6; Logue Direct, Day 3, 5/24100, a.m. session]**

G

39. In general, bank CDs are included with fixed income instruments and equities in many investor portfolios. **[Plaintiffs' Ex. 10; 3/16/98 Logue Report, p.2; see Logue Direct, Day 3, 5/24/00, a.m. session; see Morrison Direct, Day 4, 5/25/00, a.m. session]**

G

40. Rate of return and risk are factors to be considered in decisions whether and how to reallocate asset classes in a portfolio. **[Hebert Direct, Day 1, 5/22/00, p.m.**

session, Ruedig Direct, Day 3, 5/24/00, p.m. session; Morrison Direct, Day 4, 5/25/00, a.m. session] G

41. Investors with money market accounts have checking privileges and credit card privileges. **[Hebert Direct, Day 1, 5/22/00, p.m. session; Ruedig Direct, Day 3, 5/24/00, p.m. session, Morrison Direct, Day 4, 5/25/00, a.m. session]** G

42. Bank CDs and equities, such as common stock, are substituted for each other in the course of routine portfolio reallocation. **[Plaintiffs' Ex. 10, 3/16/98 Logue Report, p. 8; Hebert Direct, Day 1, 5/22/00 p.m. session; Logue Direct, Day 2, 5/23/00, a.m. session, Ruedig Direct, Day 3, 5/24/00, p.m. session, Morrison Direct, Day 4, 5/25/00, a.m. session]** G

43. Active money managers of investor portfolios routinely substitute cash equivalents for equities and vice versa in the course of reallocating investor portfolios. **(Plaintiffs' Ex. 10, 3/16/98 Logue Report, p.2; Hebert Direct, Day 1, 5/22/00, p.m. Session; Hebert Re-Direct, Day 2, 5/23/00, p.m. session; Hebert Re-Direct, Day 3, 5/24/00, p.m. session; see Ruedig Direct, Day 3, 5/24/00, p.m. session, Ruedig Direct, Day 3, 5/24/00, p.m. session, Morrison Direct, Day 4, 5/25/00, a.m. session]** G (although usually on a temporary basis)

44. Both active and passive investors substitute bank CDs, fixed income instruments and equities for one another in the course of portfolio management. **[Plaintiffs' Ex. 10, 3/16/98 Logue Report, p. 8, Ruedig Direct, Day 3,**

5/24/00, p.m. session, Morrison Direct, Day 4, 5/25/00, a.m. session] D (as to the term "substituted")

45. In managing clients' portfolios, financial planning providers like The Harbor Group, Inc. and Paine Webber move clients' respective funds back and forth between asset classes to be consistent with clients needs. **[Hebert Direct, Day 1, 5/22/00, p.m. session; Ruedig Direct, Day 3, 5/24/00, p.m. session]** G

46. New Hampshire investors have reallocated assets in their portfolios from equities to CDs and vice versa to address financial goals such as funding college education. **[Hebert Direct, Day 1, 5/22/00, p.m. session; Hebert Re-Direct, Day 3, 5/24/00, p.m. session, Ruedig Direct, Day 3, 5/24/00, p.m. session, Morrison Direct, Day 4, 5/25/00, a.m. session]** G

47. Financial planning providers such as The Harbor Group; Inc. recommend clients invest in a spectrum of financial investments ranging from equities to conservative fixed income investments or cash equivalents. **[Hebert Direct, Day 1, 5/22/00, p.m. session; Ruedig Direct, Day 3, 5/24/00, p.m. session]]** G

48. As portfolio rebalancing occurs, the return available to the investor affects the way that the rebalancing will occur. **[Logue Direct, Day 3, 5/24/00, a.m. session, Ruedig Direct, Day 3, 5/24/00, p.m. session, Morrison Direct, Day 4, 5/25/00, a.m. session]** G

49. As portfolio rebalancing occurs, the return of investments affects the amount shifted from equities to cash equivalents. **[Logue Direct, Day 3, 5/24/00, a.m. session; Guerin-Calvert Cross, Day 5, 5/30/00, p.m. session]** G

50. Investors during 1991-1994 were not different from, and behaved in the same way as, investors during other periods of time before 1991 and after 1994. **[Hebert Direct, Day 1, 5/22/00, p.m. session]** G

51. Banks have changed in order to react to and deal with competitive forces in the market because banks are in competition with financial intermediaries for investment capital. **[Hebert Direct, Day 1, 5/22/00, p.m. session; Morrison Direct, Day 4, 5/25/00, a.m. session]** D

52. Money market funds compete with bank deposits for investors' funds. **[Hebert Direct, Day 1, 5/22/00, p.m. session citing p. 199 of Hebert Deposition, Ruedig Direct, Day 3, 5/24/00, p.m. session, Morrison Direct, Day 4, 5/25/00, a.m. session]** D

53. Investment is defined as a commitment of money in order to earn a financial return. **[Hebert Direct, Day 1, 5/22/00, p.m. session]** G

54. An increase in the effective after-tax yield of New Hampshire bank deposit products affects purchase decisions among every financial asset available to New Hampshire residents. **[Plaintiffs' Ex. 10, 3/16/98 Logue Report, p. 2]**. D

55. The effective after-tax yield of an investment is a consideration of investors when comparing the yield of various financial instruments. **[Plaintiffs' Ex. 10; 3/16/98 Logue Report, p. 10; Hebert Direct, Day 1, 5/22/00, p.m. session; Logue Direct, Day 2, 5/23/00, a.m. session; see Ruedig Direct, Day 3, 5/24/00, p.m. session (discussed Interest and Dividends Tax with clients); Morrison Direct, Day 4, 5/25/00, a.m. session]** G

56. The Interest and Dividends Tax was one factor in determining where investors would place their money. **[Sullivan Direct, Day 1, 5/22/00, p.m. session; Hebert Direct, Day 1, 5/22/00, p.m. session]**
G (consistent with Court Order)

57. The Interest and Dividends Tax's exemptions made bank deposit instruments and bank stocks look more attractive to investors than they otherwise would have. **[Sullivan Direct, Day 1, 5/22/00, p.m. session]**
G (as to out of state banks)

58. From 1991 through 1994, various financial advisors and financial intermediaries considered and discussed the interest and dividends tax exemptions when advising their clients about investments. G

59. Many New Hampshire Interest and Dividends taxpayers were aware of the tax exemption and invested in order to take advantage of the exemption. **[Sullivan Direct, Day 1, 5/22/00, p.m. session]** Neither G nor D

60. Taxable investments must offer a higher rate of return than non-taxable investments of similar risk, liquidity and convenience. **[Plaintiffs' Ex. 10, 3/16/98 Logue Report, p. 10]**. G

61. New Hampshire bank deposit products such as CDs, money market accounts, checking and savings accounts competed with out-of-state bank deposit products from 1991-1994. **[Hebert Direct, Day 1, 5/22/00, p.m. session, Ruedig Direct, Day 3, 5/24/00, p.m. session, Morrison Direct, Day 4, 5/25/00, a.m. session]** G

62. In 1994-1994, New Hampshire bank source income competed with out of state bank source income. **[Hebert Direct, Day 1, 5/22/00, p.m. session; Hebert Re-Direct, Day 3, 5/24/00, p.m. session, Ruedig Direct, Day 3, 5/24/00, p.m. session, Morrison Direct, Day 4, 5/25/00, a.m. session]** G

63. From 1991-1994 New Hampshire banks had a competitive advantage over out-of-state banks nationwide due to the exemption. **[Hebert Direct, Day 1, 5/22/00, p.m. session]** G

64. Financial Investments that earn interest compete with bank products. **[Hebert Direct, Day 1, 5/22/00 p.m. session, citing to Hebert Deposition; Ruedig Direct, Day 3, 5/24/00, p.m. session, Morrison Direct, Day 4, 5/25/00, a.m. session]** D

65. As with other investments including stock and money market funds, New Hampshire bank products and

bank stock possess all four characteristics of expected returns, risk, convenience and liquidity. **[Logue Direct, Day 2, 5/23/00, a.m. session; Hebert Re-Direct, Day 3, 5/24/00, p.m. session]** G

66. New Hampshire bank depository products, and bank stocks, compete with virtually every other financial product in the national financial market because all of these financial products have four characteristics in common to varying degrees: (1) expected returns, (2) risk, (3) convenience, and (4) liquidity. **[Logue Direct, Day 2, 5/23/00, a.m. session; Logue Direct, Day 3, 5/24/00, a.m. session; Hebert Re-Direct, Day 3, 5/24/00, p.m. session; Ruedig Direct, Day 3, 5/24/00, p.m. session, Morrison Direct, Day 4, 5/25/00, a.m. session]** D

G. There is Competition Between Exempt *Dividend-Bearing* Investments and Taxed *Dividend-Bearing* Financial Investments

67. Several major shareholders in Dartmouth National Bank, including Dartmouth College, Dartmouth Savings Bank and Home Insurance Company held large portions of Dartmouth National Bank stock as a small portion of their total portfolios, and were also investing in a range of other products, including: fixed income products, domestic and foreign stocks, bonds, savings bank investments, mortgage futures, Treasury Bills and cash equivalents. **[Logue Direct, Day 2, 5/23/00, a.m. session]** G

68. Most, if not all, of the investors who held stock in Dartmouth National Bank did so as an investment and in

order to make money. **[Logue Direct, Day 2, 5/23/00, a.m. session]** G

69. Bids for available Damnouth National Bank stock and Ledyard National Bank of Hanover ("Ledyard National Bank") stock tended to follow general publicly traded stock price trends. **[Logue Direct, Day 2, 5/23/00, a.m. testimony]** Neither G nor D

70. Out-of-state investors who purchased stock in Dartmouth National Bank perceived this investment to be similar to buying stock in Citicorp or IBM. In all instances, the investment was made for financial gain. **[Logue Direct, Day 2, 5/23/00, a.m. session]** Neither G nor D

71. When Ledyard National Bank, an exempt bank, raised its initial equity capital in 1991, more than 20% of total capital was invested by investors who lived outside of New Hampshire. **[Plaintiffs' Ex. 10, 3/16/98 Logue Report, p. 2]** G

72. When New Dartmouth Bank, an exempt bank, was created in 1991, most of its investors lived outside the State of New Hampshire. **[Plaintiffs' Ex. 40, Jeannotte Deposition Excerpts, p. 47]**. G

73. First Albany Corp., a national brokerage firm during the period 1991-1994, made a market for the purchase and sale of New Hampshire bank stocks. **[Plaintiffs' Ex. 40, Jeannotte Deposition Excerpts, p. 48; Campagna Direct and Cross, Day 6, 5/31/00, a.m. session]** G

74. J.P Morgan and Citigroup, which are both out of state bank stocks, and part of the Dow Jones Index, are publicly traded. **[Logue Direct, Day 3, 5/24/00, a.m. session]**
G

75. Stocks in J.P. Morgan and Citigroup are available to New Hampshire investors and compete with other publicly traded non-bank stock for investment dollars. **[Logue Direct, Day 3, 5/24/00, a.m. session]**
G

76. During the period 1991-1994, New Hampshire investors had available to them, through financial intermediaries such as stock brokerage companies and bank trust departments, the opportunity to purchase equity securities, fixed income instruments and money market funds in interstate commerce and did in fact purchase such investments during that period. **[See Logue Cross, Day 3, 5/24100, a.m. session; Ruedig Direct, Day 3, 5/24/00, p.m. session; Morrison Direct, Day 4, 5/25/00, a.m. session]** G

77. During the period 1991-1994, New Hampshire investors who owned New Hampshire bank stocks also owned a wide variety of interstate investments such as money market funds, fixed income instruments and equity securities. **[Logue Direct, Day 2, 5/23/00, a.m. session; Morrison Direct, Day 4, 5/25/00, a.m. session; Singh Direct, Day 4, 5/25/00, a.m. session]**
G

78. First New Hampshire/First Capital's clients held in their portfolios stock in New Hampshire Savings Bank, Centerpoint Bank and other stock in banks which were

not publicly traded. **[Morrison Direct, Day 4, 5/25/00, a.m. session]** G

79. New Dartmouth Bank stock, which is not publicly traded, was held by the New Hampshire Retirement System in its portfolio. **[Singh Direct, Day 4, 5/25/00, a.m. session, Plaintiffs' Ex. 14, p. 49]**. G

80. Dividends on New Dartmouth Bank stock were exempt from the Interest and Dividends Tax. **[Singh Direct, Day 4, 5/25/00, a.m. session, Defendant's Ex. 20]**. G

81. In 1994, the New Hampshire Retirement System sold its stock in Shawmut Bank (formerly New Dartmouth Bank) for a gain of approximately $9 million. **[Singh Direct, Day 4, 5/25/00, a.m. session, Plaintiffs' Ex. 19-20]**. G

82. Factoring in the four factors of return, risk, convenience and liquidity, Citibank stock competes with stock issued by Ledyard Bank. **[Logue Cross, Day 3, 5/24/00, a.m. session]** D

83. Characteristics of ownership of New Hampshire bank stock are identical to ownership of stock in other corporations, with the exception that the bank stock is not publicly traded. **[Hebert Direct, Day 2, 5/23/00, p.m. session]** D

84. In 1991-1994 the stock of exempt New Hampshire stock banks competed with the stock of New Hampshire bank holding companies that were publicly traded.

[Hebert Direct, Day 2, 5/23/00, p.m. session] D

85. In the 1990's, stock in New Hampshire-based Amoskeag Bank competed with Ford Motor Company stock in the sense that one stock competed with another stock in the marketplace. **[Hebert Direct, Day 2, 5/23/00, p.m. session]** G

86. In 1991-1994, stock dividends issued by New Hampshire banks had an advantage over dividends issued by non-exempt banks. **[Hebert Direct, Day 2, 5/23/00, p.m. session]** G

87. An asset that is not publicly traded, such as New Hampshire bank stock, still competes with other publicly traded stocks, because investors who are holding the New Hampshire bank stock have chosen to hold that asset instead of a higher quantity of another financial instrument, because the investor believes he can earn a higher rate of return. **[Logue Direct, Day 3, 5/24/00, a.m. session; Ruedig Direct, Day 3, 5/24/00, p.m. session, Morrison Direct, Day 4, 5/25/00, a.m. session]** D

88. Under a supply-side analysis, a New Hampshire bank stock, even if thinly traded, is in competition with non-bank equities because these assets are in competition in the portfolio of an investor who holds New Hampshire bank stock. **[Logue Direct, Day 3, 5/24/00, a.m. session]** D

89. New Hampshire bank stock, even if thinly traded, competes with other products in the market place because in return for the increased risk and difficulty in

selling the stock, an investor will often earn a higher rate of return. **[Logue Direct, Day 2, 5/23/00, a.m. session]** D

90. Dividend-bearing New Hampshire bank stocks compete with dividend-bearing investments, which were taxable under RSA 77, issued by the following entities described in Plaintiffs' Ex. 9A-9C.

a. Corporations **[Logue Direct, Day 3, 5/24/00, a.m. session; Ruedig Direct, Day 3, 5/24/00, p.m. session, Morrison Direct, Day 4, 5/25/00, a.m. session]** D

b. Out-of-state banks **[Logue Direct, Day 3, 5/24/00, a.m. session; Ruedig Direct, Day 3, 5/24/00, p.m. session, Morrison Direct, Day 4, 5/25/00, a.m. session]** G

c. Mutual funds **[Sullivan Direct, Day 1, 5/22/00, p.m. session; Ruedig Direct, Day 3, 5/24/00, p.m. session, Morrison Direct, Day 4, 5/25/00, a.m. session]** D

d. Automatic dividend reinvestment programs **[See Plaintiffs' Ex. 9B]** D

e. General and limited partnerships with transferable shares **[See Plaintiffs' Ex. 9B; Ruedig Direct, Day 3, 5/24/00, p.m. session]** D

f. Trusts with transferable shares **[See Plaintiffs' Ex. 9B]** D

g. Limited liability companies with transferable shares D

h. Forgiveness of Debt [See **Logue Direct, Day 3, 5/24/00, a.m. session]** D

91. The effect of making dividends from New Hampshire banks exempt from New Hampshire interest and dividends taxes was to place competing interstate investments at some disadvantage. **[Plaintiffs' Ex. 10, 3/16/98 Logue Report, p. 10; Sullivan Direct, Day 1, 5/22/00 p.m. session; see Hebert Direct, Day 2, 5/23/00, p.m. session (New Hampshire stock banks with advantage over non-exempt banks); Morrison Cross, Day 4, 5/25/00, a.m. session]** G

92. The Court finds that based on finance theory predictions, the effect of the tax exemption at issue in this case caused New Hampshire residents to hold fewer interstate investments than they might otherwise have held. **[Plaintiffs' Ex. 10, 3/16/98 Legue Report, p. 10; Logue Cross, Day 3, 5/24/00, p.m. session]** D

H. In an Integrated Global Marketplace for Financial Investments, There is Competition Between Local Favored Interest-Bearing and Dividend-Bearing Investments and Taxed Interest-Bearing and Dividend-Bearing Financial Investments

93. An investor's choice of investments will depend upon the investor's objectives and degree of risk.

[Hebert Direct, Day 1, 5/22/00, p.m. session; Ruedig Direct, Day 3, 5/24/00, p.m. session, Morrison Direct, Day 4, 5/25/00, a.m. session] G

94. All assets within each asset class are considered investments. **[Hebert Direct, Day 1, 5/22/00, p.m. session]** G

95. In making financial decisions, a monetary value may be assigned to tile concept of convenience or the other factors of risk, return and liquidity: **[Logue Cross, Day 3 5/24/00, p.m. session]** G

96. Passbook savings accounts, checking accounts and cash equivalent money market funds are investments. **[Hebert Direct, Day 1, 5/22/00, p.m. session; Logue Cross, Day 3, 5/24/00, a.m. session; Ruedig Direct, Day 3, 5/24/00, p.m. session, Morrison Direct, Day 4, 5/25/00, a.m. session]** G

97. Annuities compete with certificates of deposit. **[Hebert Cross by State, Day 2, 5/23/00, p.m. session]** D

98. High grade, short-term corporate bonds compete with certificates of deposits. **[Hebert Cross by State, Day 2, 5/23/00, p.m. session]** D

99. Cash equivalents, such as certificates of deposit, money market funds and municipal bond money market funds, are used by New Hampshire investors as part of their portfolios. **[Logue Direct, Day 3, 5/24/00, a.m. session; Guerin-Calvert Cross, Day 5, 5/30/00, p.m.**

session; Ruedig Direct, Day 3, 5/24/00, p.m. session, Morrison Direct, Day 4, 5/25/00, a.m. session] G

100. Transactions occur between cash equivalents and equities in mutual funds based in part on different and changing expectations of mutual fund managers. **[Logue Direct, Day 3, 5/24/00, a.m. session; Ruedig Direct, Day 3, 5/24/00, p.m. session, Morrison Direct, Day 4, 5/25/00, a.m. session]** G

101. In 1991-1994, Paine Webber offered money market funds to its customers which included CDs, commercial paper and repository instruments. **[Ruedig Direct, Day 3, 5/24/00, p.m. session]** G

102. In 1991-1994, First New Hampshire/First Capital's Trust Department considered banks and financial intermediaries to be competitors. **[Morrison Direct, Day 4, 5/25/00, a.m. session]** G

103. In 1991-1994, New Hampshire banks began selling mutual fund products and annuities to retail customers. **[Morrison Direct, Day 4, 5/25/00, a.m. session]** G

104. In 1991-1994, New Hampshire banks lost customers to financial intermediaries as a result of lower interest rates on bank-deposit products. **[Morrison Direct, Day 4,5/25/00, a.m. session]** Neither G nor D

105. Under the free-flow theory, savings accounts and equities are in competition with each other because investors use money in their savings accounts to buy equities,

or place their money in such accounts after selling equities. **[Hebert Re-direct, Day 2, 5/23/00, p.m. session]** D

106. Financial instruments do not need to be substitutes in order to be in competition. **[Hebert Re-direct, Day 2, 5/23/00, p.m. session]** D

107. Between 1991-1994, billions of dollars of assets in New Hampshire banks were invested in CDs. **[Morrison Direct, Day 4, 5/25/00, a.m. session]** G

108. The bank consolidation which took place in New Hampshire in the 1990s was part of a national phenomenon. **[Logue Direct, Day 3, 5/24/00, a.m. session]** G

109. New Hampshire bank investments were in competition with interstate non-bank investments in 1991-1994. **[Morrison Direct, Day 4, 5/25/00, a.m. session]** D

110. From 1991-1994, New Hampshire bank stocks competed with bank and non-bank Financial Investments. **[Logue Direct, Day 3, 5/24/00, a.m. session; Ruedig Direct, Day 3, 5/24/00, p.m. session, Morrison Direct, Day 4, 5/25/00, a.m. session]** D

111. The Lancaster National Bank calculates its CD interest rates based on United States treasury bills and in relation to the rates required by the Federal Reserve Bank. **[Seppala Direct, Day 6, 5/31/00, a.m. session]**. G

112. The Lancaster National Bank considers U.S. Treasury Bills and U.S. savings bonds in area banks as its competition in the CD market. **[Seppala Direct, Day 6, 5/31/00, a.m. session]**.
G

113. Mr. James Seppala, who serves as President of Lancaster National Bank, was not aware of the repeal of the interest and dividends tax exemption until either November or December of 1995. **[Seppala Direct, Day 6, 5/31/00, a.m. session]**.
G

114. New Hampshire bank deposit products constitute a part of the national market of competing financial investments. 3/16/98 Logue Report, p. 2). **[Logue Direct, Day 3, 5/24/00, a.m. session; Logue Cross, Day 3, 5/24/00, a.m. session]**
D

115. During the period of 1991 through 1994, New Hampshire bank deposit products competed with all other fixed income investments and equity investments, including investment classes listed on Exhibits 9A, 9B and 9C in a dynamic portfolio allocation context. **[Plaintiffs' Ex. 10, 3/16/98 Logue Report, p. 11; See Logue Direct, Day 2, 5/23/00, a.m. session; Logue Direct, Day 3, 5/24/00, a.m. session; Logue Cross, Day 3, 5/24/00, p.m. session; see Morrison Direct, Day 4, 5/25/00, a.m. session]** D

116. Bank deposit products competed with other products, such as annuities, mutual funds, and insurance. **[Sullivan Direct, Day 1, 5/22/00, p.m. session]** D

117. On April 19, 1995, Harold Sullivan, as a representative of a group which sells mutual funds holding equities, fixed income instruments of various maturities and cash equivalents, testified before the New Hampshire Legislature that those whom he represented believed that the Interest and Dividends Tax and exemptions provided New Hampshire banks with an artificial competitive advantage over sellers of products such as insurance, annuities and mutual funds. **[Sullivan Direct, Day 1, 5/22/00, p.m. session]** G

118. The purchase of whole or universal life insurance, mutual funds or annuities are all investment options to New Hampshire investors. **[Sullivan Re-Direct, Day 1, 5/22/00, p.m. session]** G

119. New Hampshire bank deposit products, including CDs and Money Market Funds, compete with bank deposit products offered by out-of state banks. **[Plaintiffs' Ex. 10, 3/16/98 Logue Report, p. 2; Hebert Dir., Day 1, 5/22/00 p.m. session; Logue Direct, Day 2, 5/23/00, a.m. session; see Morrison Direct, Day 4, 5/25/00, a.m. session; Morrison Cross, Day 4, 5/25/00, a.m. session]** G

120. New Hampshire bank deposit products, including CDs and Money Market Funds compete against other money market products offered directly or through financial intermediaries. **[Plaintiffs' Ex 10, 3/16/98 Logue Report, p. 2]** D

121. The Court finds that New Hampshire banks that issued investments such as CDs offering interest were in competition for the capital of New Hampshire residents with

interstate banks that offered such investments. **[See Hebert Re-Direct, Day 3, 5/24/00, p.m. session]** G

122. The Court finds that New Hampshire bank investments such as CDs were in competition for the capital of New Hampshire residents with other Financial Investments such as commercial paper, interest-bearing corporate debt instruments and other interest-bearing investments, as well as dividend-bearing investments. D

123. During 1991-1994, New Hampshire suppliers of Financial Investments including mutual funds containing fixed income instruments and publicly and privately traded securities, considered New Hampshire bank deposit products and stocks to compete with all equity securities and fixed income instruments. **[Sullivan Direct, Day 1, 5/22/00 p.m. session]** D

124. CDs compete with Long Maturity Fixed Income Instruments. **[Plaintiffs' Ex. 10, 3/16/98 Logue Report, p. 8]** D

125. New Hampshire banks compete in a national market. **[Hebert Re-Direct, Day 3, 5/24/00, p.m. session]** D

126. The New Hampshire bankers who testified considered their bank stock as part of their investment portfolio. **[Seppala Cross, Day 6, 5/31/00, a.m. session; Campagna Cross, Day 6, 5/31/00, a.m. session; Gagne Cross, Day 6, 5/31/00, a.m. session]**. G

127. Buyers who offered a sufficient price would be able to make a purchase of substantial shares of the stock in a New Hampshire bank. **[Seppala Cross, Day 6, 5/31/00, a.m. session]**. G

128. Woodsville Guaranty Savings Bank on the border of Vermont, has interstate competition such as the Wells River Savings Bank of Vermont. **[Gagne Direct, Day 6, 5/31/00, a.m. session]**. G

129. There were no sellers of Woodsville Guaranty Savings Bank stock who wished to sell Woodsville Bank shares and were unable to do so. **[Gagne Cross, Day 6, 5/31/00, a.m. session]**. G

130. First Albany and Ryan Beck, a New Jersey brokerage company, made a market in Berlin City Bank stock. **[Campagna Cross, Day 6, 5/31/00]**. G

131. Seacoast Savings Bank, a New Hampshire stock bank, is publicly traded. **[Campagna Cross, Day 6, 5/31/00; Plaintiffs' Exhibit 26]**. G

132. There exists a broad, national market in which all financial investments compete with one another for investment dollars. **[Plaintiffs' Ex 10, 3/16/98 Logue Report, p. 2; Logue Direct, Day 3, 5/24/00, a.m. session; Logue Cross, Day 3, 5/24/00, p.m. session; see Hebert Redirect, Day 3, 5/24/00, p.m. session]** D

133. The Court finds that New Hampshire banks that issued stock offering dividends were in competition for the capital of New Hampshire residents with interstate banks or bank holding companies that issued such investments. **[See Hebert Direct, Day 1, 5/22/00 p.m. Session; Hebert Direct, Day 2, 5/23/00, p.m. session; see Morrison Direct, Day 4, 5/25/00, a.m. session]** D

134. The Court finds that New Hampshire stock banks were in competition for the capital of New Hampshire residents with other enterprises that issued stock. **[Logue Direct, Day 2, 5/23/00, a.m. session; Hebert Direct, Day 2, 5/23/00, p.m. session]** D

135. The Court finds that interest-bearing New Hampshire bank deposit products compete with the following interest-bearing and dividend-bearing investments which were taxable under RSA 77:

a. Out-of-state bank deposit product interest **[Logue Direct, Day 3, 5/24/00, a.m. session]** G

b. Notes, **[Id.]**. D

c. Money Market accounts through financial intermediaries **[Hebert Direct, Day 1, 5/22/00, p.m. Session; see Plaintiffs' Ex. 9B, Ruedig Direct, Day 3, 5/24/00, p.m. session]** D

d. Short term commercial paper **[Plaintiffs' Ex. 9B]** D

e. Short and long term fixed income instruments **[Logue Direct, Day 3, 5/24/00, a.m. session]** D

f. Life insurance interest **[Sullivan testimony Direct, Day 1, 5/22/00, p.m. Session]** D

g. Private mortgages and loans **[Logue Direct, Day 3, 5/24/00, a.m. session]** D

h. Non-New Hampshire municipal bond interest **[Logue Direct, Day 3, 5/24/00, a.m. session]** D

i. Annuities **[Sullivan Direct, Day 1, 5/21/00 p.m. session; Morrison Direct, Day 4, 5/25/00, a.m. session]** D

j. Preferred stock **[Logue Direct, Day 3, 5124100, a.m. session]** D

k. Publicly traded common stock **[Ruedig Direct, Day 3, 5/24/00, p.m. session]** D

1. Privately held common stock **[Ruedig Direct, Day 3, 5/24/00, p.m. session]** D

m. General and limited partnership distributions **[Ruedig Direct, Day 3, 5/24/00, p.m. session]** D

n. Limited liability companies distributions **[Logue Direct, Day 3, 5/24/00, a.m. session]** D

o. Trust distributions where shares are transferable **[See generally Morrison Direct, Day 4, 5/25/00, a.m. session]** D

136. If New Hampshire passed a tax that exempted dividends from small cap growth stock, such a tax would have some effect on competition in New Hampshire for interstate small cap growth stocks. **[Hebert Re-Direct, Day 3, 5/24/00, p.m. session]** Neither G nor D

137. Paine Webber could direct a client to an owner of stock if the client wished to purchase bank stock in Bow Mills Bank. **[Ruedig Direct, Day 3, 5/24/00, p.m. session]** G

138. Working backward from the $38 Million raised from the Interest and Dividends Tax in 1994, $30-$40 Billion of investments were subject to the Interest and Dividends Tax. **[Morrison Direct, Day 3, 5/24/00, p.m. session]** G

139. In 1991, $13.7 million of New Hampshire bank interest and dividends was exempted from the tax; in the same year, approximately $37 million in interest and dividends tax was paid. Thus, the exemption amounted to over 25 % of the

interest and dividends paid to New Hampshire taxpayers in that year. **[Arnold Cross, Day 4, 5/26/00, p.m. session]** G

140. In approximately 1989, New Hampshire Department of Revenue Administration Commissioner Stanley Arnold became concerned that the Interest and Dividends Tax was unconstitutional. **[Arnold Cross, Day 4, 5/25/00, p.m. session]**. G

141. In 1991-1994, when the Interest and Dividends Tax was collected, New Hampshire Department of Revenue Administration Commissioner Stanley Arnold had already brought his concerns about the tax's constitutionality to the attention of the Governor and the State Attorney General's office. **[Arnold Cross, Day 4, 5/25/00, p.m. session]**. G

I. The State Presented No Substantial Countervailing Evidence Disputing the Plaintiffs' Position and Presented Evidence Which Supports the Plaintiffs' Position that Competition Exists

142. The State's expert Ms. Margaret Guerin-Calvert did not make any conclusions as to whether CDs competed with money market funds or bonds. **[Guerin-Calvert Cross, Day 5, 5/30/00, p.m. session]**. G

143. The effect that Ms. Guerin-Calvert observed in her regression analysis may be because the repeal of the interest and dividends tax was not well publicized. **[Guerin-Calvert Cross, Day 5, 5/30/00, p.m. session]**. G

144. The after tax effect of the New Hampshire bank exemption, 3-3.5%, which was used in the State's expert's repeal regression, was less than the 5-10% price adjustment typically used by regulatory authorities. **[Guerin-Calvert Cross, Day 5, 5/30/00, p.m. session]** G

145. A New Hampshire CD has attributes of an investment **[Guerin-Calvert Cross, Day 5, 5/30/00, p.m. session]**. G

146. Assuming the strict definition of a complement is that an increase of price in one product results in a decrease in the quantity of consumption of both the first and the complementary product, this effect would not be observed as to bank interest bearing products vs. Equity products and bank interest-bearing products and equities are therefore not complements. **[Guerin-Calvert Cross, Day 5, 5/30/00, p.m. session]**. G

147. The anti-trust model used by Ms. Guerin-Calvert is inappropriate to measure competition for investment dollars between New Hampshire bank deposit products and bank stock and interstate bank deposit products and bank stock. **[Logue Direct, Day 3, 5/24/00, a.m. session]** D

148. The anti-trust model used by Ms. Guerin-Calvert is inappropriate to measure competition for investment dollars between New Hampshire bank deposit products and bank stock and interstate non-bank investments. **[Logue Direct, Day 3, 5/24/00, a.m. session]** D

II. REQUESTS FOR RULINGS OF LAW

A. Actual discrimination, wherever it is found, is impermissible, and the magnitude and the scope of the discrimination have no bearing on the determinative question whether with Court discrimination has occurred in violation of the Commerce Clause. Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine, 520 U.S. at 581, 117 S.Ct. at 1600, n. 15; Associated Industries of Mo. v. Lohman, 511 U.S. 641, 650, 114 S.Ct. 1815, 1822 (1994); Maryland v. Louisiana, 451 U.S. 725,760, 101 S.Ct. 2114, 2136 (1981) ("we need not also determine the actual impact of the discriminatory tax."); Annenberg v. Commonwealth of Pennsylvania, 1998 WL 156775, *3.

G Consistent with Court Order

B. State laws which discriminate against interstate commerce on their face or have a discriminatory purpose or effect are virtually *per se* invalid. Fulton Corp. v. Faulkner, 516 U.S. 325, 331, 116 S.Ct. 848, 854 (quoting Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon, 511 U.S. at 99, 114 S.Ct. at 1350). G

C. It is not necessary to look beyond the text of RSA 77 to determine that it discriminates against interstate commerce. See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine, 520 U.S. 564, 576, 117 S.Ct. 1590, 1598 (1997); Annenberg v. Commonwealth of Pennsylvania, 1998 WL 156775, *3. G

D. RSA 77 facially discriminates against the full range of interstate investments on which the interest and dividends tax is levied. Fulton Corp. v. Faulkner, 516 U.S. 325, 116 S. Ct. 848 (1997). D

E. The Smith Court also found that RSA 77 had a discriminatory purpose to "encourage local industry by means of taxing measures that impose greater burdens on economic activities taking place outside the State than would be placed on similar activities inside the State, (Smith, at 696) and that RSA 77 was a "protectionist effort." G

F. The Smith Court also found had RSA 77 had a discriminatory effect. "[B]y classifying investment income in this way, [based on the situs of the payor] the General Court encourages investment in domestic banks and financial institutions... This is precisely the discrimination that violates the commerce clause, as the State has conceded. The limiting power of the United States Constitution over state actions in such circumstances renders futile the protectionist efforts." Smith, at 688, 692 A.2d at 492 D

G. The Plaintiffs are not required to demonstrate substantial competition between New Hampshire bank deposit products and Financial Investments subject to the interest and dividends tax. See Bacchus Imports v. Dias, 468 U.S. 263, 269, 104 S.Ct. 3049, 3054 (1984) (the fact tax-exempted liquors did not constitute a present "'competitive threat" to other liquors was not dispositive of whether competition existed; the court need not know how unequal the tax is before concluding it unconstitutionally discriminates); Smith, 141 N.H. 681, 692 A.2d 486 (Court did not require Plaintiffs to establish "competition" by proving a "substantial and measurable burden" on interstate commerce). D

H. The Plaintiffs are not required to show that investment assets on which an interest and dividends tax was paid are "close substitutes" of new Hampshire bank deposit products and stock in order to establish competition. Plaintiffs need only establish Some competition between New Hampshire banks deposit products or stocks and of Financial Investments in order to entitle the taxpayer to a remedy with respect to the tax on that investment. D

I. As long as there is some competition between New Hampshire bank deposit products and Financial Investments subject to the interest and dividends tax, RSA 77 facially discriminates against all Financial Investments; Bacchus Imports v. Dias, 468 U.S. at 271, 104 S.Ct. at 3055; see Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine, 520 U.S. at 581, 117 S.Ct. at 1600, n. 15 (a particularized showing of the effects of the discrimination is not required to establish constitutionally impermissible discrimination); Smith, at 695,692 A.2d at 497. D

J. There is no "de minimis" defense available to the State regarding the Plaintiffs' charge of discriminatory taxation under the Commerce Clause. Camps Newfound/Owatonna Inc. v. Town of Harrison, Maine, 520 U.S. 564, 581, 117 S.Ct. 1590, 1600, n. 15; Fulton Corp. v. Faulkner, 516 U.S at 333 n. 3; 116 S.Ct. at 855, n. 3 D

K. In considering whether New Hampshire bank stocks compete with interstate enterprises, the Court should consider all New Hampshire bank stocks; whether a bank actually issued dividends from 1991-1994 is irrelevant because it is the potential for tax-exempt dividends, not the dividend history, that gives New Hampshire bank stocks a competitive advantage. G

L. During the years 1991-1994 New Hampshire bank interest and dividends competed with all other sources of investment income such as stock dividends and bond interest. D

M. During the years 1991 - 1994 New Hampshire bank deposit products competed with all Financial Investments offered to New Hampshire investors. D

N. During the year 1991-1994 New Hampshire bank stocks competed with all other equity investments offered to New Hampshire investors. D

O. Based on portfolio theory and asset allocation, during the years 1991-1994 all Financial Investments competed with New Hampshire bank deposit products and stocks. D

P. From 1991 - 1994 RSA 77 discriminated against all Financial Investments. D

Q. Pursuant to the November 25, 1998 Stipulation between the Plaintiffs and the State, the same remedy for the commerce clause violation shall be applied to each Plaintiff or Class Member who has perfected his or her tax refund claim and who paid tax on interest and dividends from sources of investment income that competed with interest and dividends from New Hampshire banks See attached Ex. C, Stipulation dated November 23, 1998. G

R. New Hampshire banks that issued stock offering dividends were not only in competition for the capital of New Hampshire residents with interstate banks (such at Citibank) that issued investments but were in competition with other interstate enterprises that issued stock offering dividends (such as General Motors or IBM). Not ruled upon

S. New Hampshire banks that issued investments such as certificates of deposit that offered interest were not only in competition for the capital of new Hampshire residents with interstate banks that offered such investments, but also were in competition with other interstate businesses that issues interest-bearing investments such as commercial paper, interest-bearing corporate debt instruments and other interest-bearing investments, as well as interstate dividend-bearing enterprises. D

T. The effect of the exemptions for New Hampshire bank interest and dividends in RSA 77 was to discriminate unlawfully against other sources of interest and dividend income as opposed to discriminating solely against income earned an investments in out-of state banks. D

U. Plaintiff Class Representatives are entitled to a refund of taxes paid on interest and dividends from 1991-94 in the amounts shown on Exhibit A.
G (consistent with the Court's Order)

WHEREFORE the Class Plaintiffs respectfully requests that this Court:

A. Grant the within Plaintiffs' Requests for Findings of Fact and Rulings of Law; and

B. Grant such other and further relief as justice may require.

Respectfully submitted,

ERNEST T. SMITH, III
SANDRA A. SMITH

MARGARET STRAW

ROBERT A. WELLS, EXECUTOR OF
THE ESTATE OF HELEN L. KENDALL

KURT M. SWENSON, TRUSTEE OF THE
SWENSON A. TRUST

UPTON, SANDERS & SMITH
PROFESSIONAL ASSOCIATION

Dated: June __, 2000

By: ________________________
Russell F. Hilliard, Esq.
10 Center Street
Concord, NH 03302
(603) 224-7791

SHEEHAN PHINNEY BASS + GREEN,
PROFESSIONAL ASSOCIATION

Dated: June _7_, 2000

By: /s/________________________
Michael C. Harvell
James Q. Shirley
Elizabeth A. Bailey
1000 Elm Street
Manchester, NH 03101
(603)668-0300

McLANE, GRAF, RAULERSON &
MIDDLETON, PROFESSIONAL
ASSOCIATION

Dated: June _7_, 2000

By: /s/________________________
Wilbur A. Glahn, III
Steven M Burke
900 Elm Street, PO Box 326
Manchester, NH 03105
(603) 625-6464

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Plaintiffs' Requests for Findings of Fact and Rulings of Law, has this day been mailed to Walter L. Maroney, Esquire, Russell F. Hilliard, Esquire, Wilbur A. Glahn, III, Esquire, David E.

Barradale, Esquire, W. Wright Danenbarger, Esquire and William F. Ardinger, Jr., Esquire.

Dated: June 7, 2000

/s/ ____________________
Michael C. Harvell

EXHIBIT A

TO

PLAINTIFFS' REQUESTS FOR FINDINGS OF FACT
AND RULINGS OR LAW

Plaintiffs' Requests for Findings of Fact and Rulings of Law with Exhibits

9 Fold-out Exhibits
Tables

pgs 141-149

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

95-E-0059

Ernest T. Smith, III and Sandra A. Smith

v.

Department of Revenue Administration of the State of New Hampshire
and Stanley R. Arnold, Jr.,

TAX CHART

Margaret M. Straw

1. **Tax-Exempt Investment Income**	**1991**	**1992**	**1993**	**1994**
a) interest from NH banks	$ 57,041.00	$ 31,950.00	$ 22,265.00	$ 17,697.00
b) obligations from NH state and municipal obligations	80,120.00 [1]	80,120.00	72,273.00	72,453.00
c) interest from federal obligations	5,531.00	5,531.00	5,531.00	4,780.00
d) dividends from NH banks	0.00	0.00	0.00	0.00
e) pass-thru income; tax paid by payor	0.00	0.00	0.00	0.00
Total Tax-Exempt Investment Income	**$142,692.00**	**$117,601.00**	**$100,069.00**	**$94,930.00**

---

[1] Includes $66,920.00 of interest from NH state and municipal obligations and $13,200.00 of interest from Puerto Rico municipal obligations which are tax-exempt under NH RSA 77.

2. **Taxable Investment Income**	**1991**	**1992**	**1993**	**1994**
a) interest from non-NH banks	$ 0.00	$ 0.00	$ 0.00	$ 0.00
b) interest from non-NH state and municipal obligations	40,852.00	44,217.00	46,881.00	54,066.00
c) interest from other payors, including financial institutions	13,689.00	11,773.00	7,391.00	7,837.00
d) dividends from non-NH banking entities	0.00	0.00	0.00	0.00
e) dividends from other payors, including financial institutions	91,038.00	93,813.00	85,284.00	83,870.00
Total Taxable Investment Income	$145,579.00	$149,803.00	$139,556.00	$145,773.00
Less Exemption	(1,200.00) 144,379.00	(1,200.00) 148,603.00	(1,200.00) 138,356.00	(2,400.00) 143,373.00
Tax Rate	x .05	x .05	x .05	x .05
Total Taxes Paid Under NH RSA 77	**$ 7,219.00**	**$ 7,430.00**	**$ 6,918.00**	**$ 7,169.00**

Swenson A. Trust

1. Tax-Exempt Investment Income	1991	1992	1993	1994
a) interest from NH banks	$ 0.00	$ 0.00	$ 0.00	$ 0.00
b) obligations from NH state and municipal obligations	0.00	0.00	0.00	0.00
c) interest from federal obligations	0.00	7,470.00	6,120.00	0.00
d) dividends from NH banks	0.00	0.00	0.00	0.00
e) pass-thru income; tax paid by payor	0.00	0.00	0.00	0.00
Total Tax-Exempt Investment Income	$ 0.00	$ 7,470.00	$ 6,120.00	$ 0.00

2. Taxable Investment Income	1991	1992	1993	1994
a) interest from non-NH banks	$ 0.00	$ 0.00	$ 0.00	$ 0.00
b) interest from non-NH state and municipal obligations	0.00	0.00	0.00	0.00

c) interest from other payors, including financial institutions	6,692.00[2]	1,575.00	0.00	0.00
d) dividends from non-NH banking entities	0.00	0.00	0.00	0.00
e) dividends from other payors, including financial institutions	22,654.00	18,998.00	22,246.00	22,412.00
Total Taxable Investment Income	$ 29,346.00	$ 20,588.00	$ 22,246.00	$ 22,412.00
Less Exemption	(1,200.00) 28,146.00	(1,200.00) 19,388.00	(1,200.00) 21,046.00	(1,200.00) 21,212.00
Tax Rate	x .05	x .05	x .05	x .05
Total Taxes Paid Under NH RSA 77	**$ 1,407.00**	**$ 969.00**	**$ 1,052.00**	**$ 1,060.00**

Swenson Marital Trust

1. **Tax-Exempt Investment Income**	**1991**	**1992**	**1993**	**1994**
a) interest from NH banks	$ 99.00	$ 0.00	$ 0.00	$ 0.00

---

[2] Includes $5,117.00 of interest from federal obligations which was incorrectly reported as taxable interest.

b) obligations from NH state and municipal obligations	0.00	0.00	0.00	0.00
c) interest from federal obligations	0.00	3,735.00	3,060.00	2,616.00
d) dividends from NH banks	0.00	0.00	0.00	0.00
e) pass-thru income; tax paid by payor	0.00	0.00	0.00	0.00
Total Tax-Exempt Investment Income	$ 99.00	$ 3,735.00	$ 3,060.00	$ 2,616.00

2. **Taxable Investment Income**	1991	1992	1993	1994
a) interest from non-NH banks	$ 0.00	$ 0.00	$ 0.00	$ 0.00
b) interest from non-NH state and municipal obligations	0.00	0.00	0.00	0.00
c) interest from other payors, including financial institutions	6,232.00 [3]	4,202.00	0.00	0.00

---

[3] Includes $2,558.00 of interest from federal obligations which was incorrectly reported as taxable interest.

d) dividends from non-NH banking entities	0.00	0.00	0.00	0.00
e) dividends from other payors, including financial institutions	26,497.00	22,812.00	25,842.00	26,595.00
Total Taxable Investment Income	$32,729.00	$27,014.00	$25,842.00	$26,595.00
Less Exemption	(1,200.00) 31,529.00	(1,200.00) 25,814.00	(1,200.00) 24,642.00	(1,200.00) 25,395.00
Tax Rate	x .05	x .05	x .05	x .05
Total Taxes Paid Under NH RSA 77	**$ 1,576.00**	**$ 1,291.00**	**$ 1,232.00**	**$ 1,269.75**

Swenson Family Trust

1. **Tax-Exempt Investment Income**	**1991**	**1992**	**1993**	**1994**
a) interest from NH banks	$ 0.00	$ 0.00	$ 0.00	$ 0.00
b) obligations from NH state and municipal obligations	0.00	0.00	0.00	0.00
c) interest from federal obligations	0.00	0.00	0.00	0.00
d) dividends from NH banks	0.00	0.00	0.00	0.00

e) pass-thru income; tax paid by payor	0.00	0.00	0.00	0.00
Total Tax-Exempt Investment Income	**$ 0.00**	**$ 0.00**	**$ 0.00**	**$ 0.00**

2. **Taxable Investment Income**	**1991**	**1992**	**1993**	**1994**
a) interest from non-NH banks	$ 0.00	$ 0.00	$ 0.00	$ 0.00
b) interest from non-NH state and municipal obligations	0.00	0.00	0.00	0.00
c) interest from other payors, including financial institutions	0.00	0.00	0.00	0.00
d) dividends from non-NH banking entities	0.00	0.00	0.00	0.00
e) dividends from other payors, including financial institutions	3,351.00	2,411.00	2,026.00	2,232.00
Total Taxable Investment Income	$3,351.00	$2,411.00	$2,026.00	$2,232.00
Less Exemption	(1,200.00) 2,151.00	(1,200.00) 1,211.00	(1,200.00) 826.00	(1,200.00) 1,032.00

Tax Rate	x .05	x .05	x .05	x .05
Total Taxes Paid Under NH RSA 77	$ 108.00	$ 61.00	$ 41.00	$ 52.00

Robert A. Wells, Executor of the Estate of Helen L. Kendall

1. **Tax-Exempt Investment Income**	**1991**	**1992**	**1993**	**1994**
a) interest from NH banks	$ 659.00	$ 645.00	$ 2,012.00	$ 5,046.00
b) obligations from NH state and municipal obligations	5,849.00	7,787.00	11,699.00	13,216.00
c) interest from federal obligations	0.00	1,605.00	5,366.00	3,166.00
d) dividends from NH banks	0.00	0.00	0.00	0.00
e) pass-thru income; tax paid by payor	0.00	0.00	3,690.00	0.00
Total Tax-Exempt Investment Income	$ 6,508.00	$ 10,037.00	$ 22,767.00	$ 21,428.00

2. **Taxable Investment Income**	1991	1992	1993	1994
a) interest from non-NH banks	$ 242.00	$ 29,419.00	$ 21,995.00	$ 13,495.00
b) interest from non-NH state and municipal obligations	3,827.00	8,351.00	9,899.00	8,444.00
c) interest from other payors, including financial institutions	21,704.00	923.00	473.00	20.00
d) dividends from non-NH banking entities	0.00	1,008.00	1,344.00	0.00
e) dividends from other payors, including financial institutions	2,046.00	6,096.00	5,537.00	13,664.00
Total Taxable Investment Income	$27,819.00	$45,797.00	$39,221.00	$35,623.00
Less Exemption	(2,400.00) 25,419.00	(2,400.00) 43,397.00	(2,400.00) 36,821.00	(2,400.00) 33,223.00
Tax Rate	x .05	x .05	x .05	x .05
Total Taxes Paid Under NH RSA 77	**$ 1,271.00**	**$ 2,170.00**	**$ 1,841.00**	**$ 1,661.15**

EXHIBIT B

TO

PLAINTIFFS' REQUESTS FOR FINDINGS OF FACT AND RULINGS OR LAW

Plaintiffs' Requests for Findings of Fact and Rulings of Law with Exhibits

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

1996 TERM

DOCKET NO. 95-852

ERNEST T. SMITH, III, et al.

v.

DEPARTMENT OF REVENUE ADMINISTRATION OF THE STATE OF NEW HAMPSHIRE, et al.

STATEMENT OF THE ISSUES IN DISPUTE

NOW COME the defendants, the New Hampshire Department of Revenue Administration and Stanley R. Arnold, Jr., Commissioner, pursuant to the Court's Order of May 2, 1996, and identify the issue to be decided by this court as follows:

The claims of the plaintiffs based on RSA 77's differing treatment of interest and dividends paid by banks, depending solely on the situs of the payor of the income, have been resolved by the State's withdrawal of its Commerce clause defenses. Distilled to their essence, the remaining issues contained in Questions Presented 1, 2, 3 and 5 can be stated concisely as follows:

> Whether the Interest and Dividends Tax, RSA 77, improperly classifies types of income or

> taxpayers in violation of the State Constitution (and the Equal Protection Clause of the United States Constitution).

The above issue is relevant and should be decided in this proceeding as explained below.

A. BACKGROUND

The plaintiffs in this case have challenged the validity of RSA 77 on two broad theories. The first is based on two exemptions contained in the statute. During the tax years in question, prior to its amendment in 1995, the statute excepted from taxation (i) interest paid by New Hampshire depository institutions and (ii) dividends paid by a handful of New Hampshire stock banks, while taxing the same kind of income from similar out-of-state payors. The State has conceded that the exemptions violated the negative implications of the Commerce Clause of the United States Constitution.[1]

The plaintiffs' second theory is based on the fact that RSA 77 does not tax all types of investment income -- it taxes only interest and dividends -- and that, prior to its amendment in 1995 it exempted interest and dividends from New Hampshire banks without just reasons. In support of this second theory, the plaintiffs relied on three provisions of the New Hampshire Constitution (Part I, Article 12; Part II, Article 5; and Part II, Article 6) as well as the Equal Protection Clause of the United States Constitution.

---

[1] The Commerce Clause of the United States Constitution (art. i, § 8, cl. 3) grants to the Congress the power "[t]o regulate commerce . . . among the several states .... " It is settled that the Commerce Clause, of necessity, withdrew from the individual states the power to take actions that placed undue burdens on or discriminated against interstate commerce. See, e.g., Oregon Waste Systems, Inc. v. Department of Environmental Quality, 114 S. Ct. 1345 (1994). Such burdens on interstate commerce are forbidden solely on the basis of federal, rather than state constitutional law.

Due to the importance of the issues raised by the plaintiffs' challenges and the need to resolve the constitutionality of RSA 77, as well as the potential of hundreds of claims being filed in the Superior Court raising similar issues, the parties agreed to seek review in this Court through a Rule 9 Interlocutory Transfer Without Ruling. After intensive negotiations, the parties agreed on the scope of the transfer and submitted it to the Superior Court. The Superior Court approved the issues for transfer to this Court. By express agreement, the parties did not transfer any remedies issues to the Court for its consideration at this time.

B. THE COMMERCE CLAUSE ISSUE IS NO LONGER IN DISPUTE

The plaintiffs submitted their brief in January 1996, arguing that the exemptions for dividend and interest payments by in-state banks violated the Commerce Clause of the United States Constitution. The defendants responded that the exemptions did not violate the Commerce Clause. The day after the defendants submitted their brief, however, the United States Supreme Court decided Fulton Corp. v. Faulkner, 116 S. Ct. 848 (1996) (issued on February 21, 1996).

In light of Fulton, it became impossible for the State to go forward with an argument that RSA 77's exemptions for payments by in-state banks would pass muster under the Commerce Clause. Accordingly, on April 29, 1996, after notifying the plaintiffs, the defendants filed a Notice with the Court that they were withdrawing the section of their brief containing the Commerce Clause argument. The State has thus conceded that the exemptions formerly contained in RSA 77, which distinguished between income received from in-state and out-of-state banks, violated the Commerce Clause of the United States Constitution.[2]

Question 4, therefore, no longer presents a disputed issue to this Court. On remand, the Superior Court must determine, based upon a factual record to be developed there, the appropriate remedy for the unconstitutional exemptions contained in RSA 77 during the tax years at issue in this case.

---

[2] The State recognized that an adverse decision in Fulton would likely mandate concession of the Commerce Clause issue. On the other hand, had the United States Supreme Court affirmed the decision of the North Carolina Supreme Court in Fulton, the State of New Hampshire would likely have prevailed on the Commerce Clause issue in this case. In order to avoid both parties' having to brief and argue an issue which would essentially be controlled by the Supreme Court's decision in Fulton, the State suggested a stay of this case pending the Fulton decision. The plaintiffs rejected that suggestion. Shortly after the briefs were filed in this case, Fulton was decided. Days later, in its Brown brief, the State signaled its concession on the Commerce Clause issue. After having an opportunity to brief state officials on Fulton, counsel filed its formal Notice with the Court, withdrawing the argument foreclosed by Fulton.

Whatever remedy the Superior Court crafts to cure the Commerce Clause problem will, by necessity, eliminate those parts of plaintiffs' claims in Questions Presented 1, 2, 3, and 5 that are based on the differing treatment of bank interest and dividends depending on the situs of the bank.

C THE ISSUES UNDER THE NEW HAMPSHIRE CONSTITUTION ARE UNAFFECTED BY THE COMMERCE CLAUSE DETERMINATION

That certain exemptions formerly contained in RSA 77 violated the Commerce Clause says nothing about whether the statute is valid under New Hampshire law. The issue under our Constitution is whether the General Court had "just reasons" for taxing certain types of income and not taxing others, and for exempting income from certain sources.

As explained in the defendants' brief, there is only one possible resolution: There were just reasons for taxing interest and dividends and just reasons for exempting income paid by New Hampshire banks. Those just reasons included the longstanding and important differences between banks and every other kind business; the avoidance of double taxation; and the desire to protect New Hampshire citizens. Indeed, this Court has decided that protection of New Hampshire citizens is a valid exercise of the state's power to tax or provide exemptions. See Opinion of the Justices, 88 N.H. 500, 511 (1937); Opinion of the Justices, 87 N.H. 490, 491 (1935),

The validity of RSA 77 under the New Hampshire Constitution should be decided by this Court. In determining the proper remedy for the Commerce Clause violation, the Superior Court will need to know whether there was a violation of the New Hampshire Constitution as well. The Superior Court's consideration of remedies may be different depending on whether the Statute is valid under the New Hampshire Constitution. For example, only a small portion of the taxes paid would have been exempt had there been no Commerce Clause violation. The rest of the taxes paid are unaffected by the Commerce Clause, but may be affected if this Court finds a State Constitutional violation. Because the Superior Court cannot craft appropriate relief without first understanding the answer to the State Constitutional questions transferred to this Court, the State Constitutional questions remain relevant.[3]

D. PLAINTIFFS' EQUAL PROTECTION CLAIMS NEED NOT BE ADDRESSED BY THE COURT

The plaintiffs have argued that RSA 77 violates the Equal Protection Clause of the United States Constitution under both their theories in this case. First, they claim that the Equal Protection Clause is violated because the exemptions discriminate between in-state and out-of-state income sources. Second, they claim that the Equal Protection Clause is violated because the tax treats recipient of interest and dividends differently from recipients of other types of investment income.

---

[3] Section E below contains a broader discussion of some of the remedies issues that may face the Superior Court.

The plaintiffs' first equal protection argument simply uses the Equal Protection Clause as a proxy or back-up for their Commerce Clause argument. This is understandable because the Supreme Court has used the Equal Protection Clause as a proxy for the Commerce Clause in situations in which the negative Commerce Clause is unavailable. For example, because explicit Congressional action has rendered the Commerce Clause unavailable in cases involving insurance, the United States Supreme Court has analyzed insurance cases involving discrimination against out-of-state companies under the Equal Protection Clause. See, e.g., Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869 (1985). In those cases, the Equal Protection Clause has provided no greater protection than the Commerce Clause would have, had it been available.

Use of the Equal Protection Clause as a proxy for the Commerce Clause is inappropriate and unnecessary in this case, because the defendants concede the Commerce Clause is applicable and that the in-state/out-of-state distinction made in two of RSA 77's former exemptions violated the Commerce Clause. Therefore, the Court need not address whether that distinction violates the Equal Protection Clause.

Likewise, the Court need not address the plaintiffs' second Equal Protection argument, that the statute violates the Equal Protection Clause because the tax treats recipients of interest and dividends differently from recipients of other types of investment income. This claim can and should be analyzed under the New Hampshire Constitution because our Constitution's parallel provisions are more protective than the federal Equal Protection Clause. See, e.g., State v. Ball, 124

N.H. 226 (1983). There simply is no need to analyze the issue separately under the United States Constitution.

As the plaintiffs appear to be continuing to press the Equal Protection Clause issue separately, however, the defendants have not withdrawn their arguments. Should the Court choose to address the Equal Protection Clause issue separately, the State has explained in its brief that RSA 77 and its exemptions pass muster under the less protective Equal Protection Clause of the United States Constitution.

E. NONE OF THE REMEDY ISSUES ARE BEFORE THIS COURT

The parties have agreed not to transfer the remedy question or to argue for a particular remedy to this Court. Such a remedy should be crafted by the Superior Court in the first instance, based upon a factual record, once the Constitutional questions are answered by this Court. Only if the parties disagree with the Superior Court's determination of relief will it become necessary to brief and argue the issue before this Court. The State discusses remedies here only to illustrate why it is that the parties agreed not to transfer the remedy question to this Court.

The State has conceded that the former exemptions for (i) interest paid by New Hampshire depository institutions and (ii) dividends paid by a handful of New Hampshire stock banks violated the Commerce Clause, because they did not apply to income from similar out-of-state payors. Those who have been aggrieved by the Commerce Clause violation are entitled to seek "meaningful backward looking relief."

McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990) .

The McKesson analysis, which will be conducted by the Superior Court, will require presentation of factual evidence and will include a resolution of such issues as (a) who will be entitled to relief, (b) what form that relief will take, and (c) severability of the statute. For some taxpayers, there may be other remedy issues as well. The parties, in negotiating the interlocutory transfer, specifically agreed that should the Court rule in favor of the plaintiffs, the issue of the McKesson remedies should be remanded to the Superior Court.

On remand, it appears that the plaintiffs will argue that the Commerce Clause violation will entitle all taxpayers who paid taxes under RSA 77 to relief, regardless of whether the Commerce Clause violations had anything to do with the taxes paid by them. The State will argue that only those taxpayers who paid additional tax because of the differing treatment of income from in-state and out-of-state banks are entitled to seek relief. For example, a person who received income in the form of common stock dividends or corporate bond interest paid the same amount of tax whether that income came from in-state or out-of-state sources. That person would not have been injured by the Commerce Clause violation conceded by the State. On the other hand, a person whose only passive income was interest from out-of-state banks would have paid the tax solely based on the situs of the bank.

That person would be entitled to seek meaningful backward looking relief under McKesson.[4]

Resolution of the New Hampshire Constitutional issues is necessary because those issues may affect the entire tax, not just the in-state/out-of-state distinctions contained in the exemptions for interest and dividends from New Hampshire banks. Without a decision on the New Hampshire Constitutional issues, the Superior Court will not be in a position to determine appropriate relief.

The issue of the appropriate relief if this Court overturns a 70-year-old statute on State Constitutional grounds is a novel one which need not be addressed by the Superior Court unless this Court rules against the State on the State Constitutional issues. The issue is not controlled by McKesson, which applies only to violations of the federal Constitution. Therefore, should this Court rule that RSA 77 violated the New Hampshire Constitution, the remedies issues should be presented to the Superior Court in the first instance, as the parties have agreed.

---

[4] None of the plaintiffs paid tax on dividends from out-of-state "stock banks" and the State is currently unaware of any taxpayers who are currently claiming refunds for taxes paid on dividends received from such out-of-state "stock banks." Therefore, it is unclear whether the Superior Court will need to address the issue of "stock bank" dividends at the remedy stage.

CONCLUSION

After this Court resolves the issue of the constitutionality of RSA 77 under the New Hampshire Constitution, the Court should remand the case to the Superior Court for a determination of the appropriate remedy for the Commerce Clause violation conceded by the State and, should it become necessary, a determination of the appropriate remedy for any State Constitutional problems.

Respectfully submitted,

NEW HAMPSHIRE DEPARTMENT OF
REVENUE ADMINISTRATION, et al

By their attorneys,

Jeffrey R. Howard
Attorney General
/s/___________________
Christopher P. Reid
Assistant Attorney General
Martin P. Honigberg
Assistant Attorney General
Civil Bureau
33 Capitol Street
Concord, New Hampshire 03301-6397
(603) 271-3658

May 6, 1996

Plaintiffs' Requests for Findings of Fact and Rulings of Law with Exhibits

May 6, 1996

I hereby certify that a copy of the foregoing was mailed this day, postage prepaid, to the following counsel for plaintiffs:

Michael C. Harvell
Sheehan, Phinney, Bass + Green
Professional Association
1000 Elm Street
P.O. Box 3701
Manchester, NH 03105-3701

Wilbur A, Glahn, III
McLane, Graf, Raulerson & Middleton
Professional Association
900 Elm Street
P.O. Box 326
Manchester, NH 03105-0326

Russell F. Hilliard
Upton, Sanders & Smith
10 Center Street
Concord, NH 03302

Mark Langan
Wiggin & Nourie, P.A.
20 Market Street
Manchester, NH 03105

/s/ ____________________________
Martin P. Honigberg

EXHIBIT C

TO

PLAINTIFFS' REQUESTS FOR FINDINGS OF FACT
AND RULINGS OR LAW

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

95-E-059

ERNEST T. SMITH, III et al.

v.

N.H. DEPARTMENT OF REVENUE ADMINISTRATION et al.

STIPULATION REGARDING CERTIFICATION OF CLASS ACTION AND DISMISSAL OF CERTAIN CLAIMS

NOW COME the parties to this action and, through their counsel, stipulate and agree as follows:

1. The parties agree that, while in the ordinary instance, class actions dealing with tax refund suits are not appropriate for certification, the following class may be certified under Superior Court Rule 27-A, for the purposes of litigating the scope of the violation of the Commerce Clause of the United States Constitution pursuant to the Supreme Court's April 3, 1997, decision in this proceeding, 141 N.H. 681 (1997), and any remedies thereunder pursuant to paragraph 8, infra:

> All taxpayers who have paid an interest and dividend tax under NH RSA 77:1 et seq. for

any of the tax years 1991 through 1994 and who have timely filed their refund claims with the Department of Revenue Administration.

2. The parties will file a motion for certification of such Class within fifteen (15) days of the date of approval of this Stipulation by the Court.

3. Plaintiffs represent that: (i) they have paid Interest & Dividends tax for some or all of the years 1991 through 1994; (ii) they have timely filed refund claims for such years with the Department of Revenue Administration; (iii) as a group, in the aggregate, they paid taxes in the years in question on a variety of sources of income which they contend competed with interest and dividends from New Hampshire banks. The sources of income on which the Plaintiffs paid tax included a range from banks paying interest on deposits to non-financial-institution business organizations paying dividends on stock. As a result of the foregoing, Plaintiffs are representative of the Class and satisfy the typicality requirements of Rule 27-A.

4. The State shall give notice of the certification of the Class to all members of the Class, provided, however, that the pro rata cost of such notice or other out-of-pocket expenses of the Class incurred by the State in the first instance shall be deducted from any refund ultimately awarded to taxpayers in the Class by method approved by the Court.

5. Attached to the Motion for Class Certification will be a notice to members of the Class of the certification of

the Class which contains a provision notifying each prospective member of the Class of their right to opt-out of the Class by executing a form mutually agreeable to the State and Class Counsel. Among other provisions, the form shall refer to the provisions of paragraph 6 of this Stipulation.

6. The Plaintiffs' claim that the municipal and state bond interest exemption is unconstitutional under the Commerce Clause of the United States Constitution is hereby dismissed with prejudice as to tax years 1991-94. This Dismissal with Prejudice is binding only as to taxpayers who remain members of the Class for refund claims for the years 1991 through 1994.

7. Whether types of income on which Plaintiff taxpayers were taxed competed with New Hampshire bank interest and dividends is the issue remanded by the New Hampshire Supreme Court (the "Remanded Issue"). The Court's findings on the Remanded Issue shall be binding on the State and on all members of the Class. The same remedy for the violation of the Commerce Clause shall be applied to each Plaintiff who has perfected his or her tax refund claim and who paid the tax on interest and dividends from sources of investment income that competed with interest and dividends from New Hampshire banks. The same remedy for the violation of the Commerce Clause will be applied to all other members of the Class who have perfected their tax refund claims and who paid the tax on interest and dividends from sources of investment income that competed with interest and dividends from New Hampshire banks.

8. If members of the Class have paid tax on interest or dividends from sources that are clearly outside the class of investments with respect to which a determination has been made as to competition with New Hampshire bank interest and dividends, the parties agree to hold such additional evidentiary proceedings as may be necessary to determine the extent of competition for such investments with tax-preferred New Hampshire bank investments yielding interest and dividends.

9. One counsel from the counsel representing the taxpayers in this matter shall be designated lead counsel in the Class Action, to be determined by the taxpayers' counsel within thirty (30) days of the date on which this Stipulation is filed and approved by the Court.

10. This Stipulation shall take effect upon approval by the Court.

Respectfully submitted,

ERNEST T. SMITH, III and
SANDRA A. SMITH and
ROBERT P. BURROUGHS (DECEASED)

By and through their attorneys,
UPTON, SANDERS & SMITH,
PROFESSIONAL ASSOCIATION

Dated: November 25 , 1998

By: /s/ _____________________

Russell F. Hilliard
10 Center Street
Concord, NH 03302
(603)224-7791

HOWARD NICHOLS and
MARGERY NICHOLS and
MARGARET STRAW

By and through their attorneys,

SHEEHAN PHINNEY BASS + GREEN,
PROFESSIONAL ASSOCIATION

Dated: November 25 , 1998

By: /s/ _____________________

James Q. Shirley
Michael C. Harvell
1000 Elm Street Manchester, NH 03101
(603)668-0300

JOHN R. MCLANE, JR. And ELISABETH D. MCLANE TRUSTEES OF THE VIRGINIA S. DEANE REVOCABLE TRUST OF 1985 THE EDUCATION TRUST and ROBERT A. WELLS, EXECUTOR OF THE ESTATE OF HELEN L.

KENDALL and ALEXANDER A. COURTNEY

By and through their attorneys,

MCLANE, GRAF, RAULERSON &
MIDDLETON, PROFESSIONAL
ASSOCIATION

Dated: November 25 , 1998

By: /s/ ____________________
Wilbur A. Glahn, III
Steven M. Burke
900 Elm Street Manchester, NH 03101
(603)625-6464

SWENSON A TRUST and
SWENSON MARITAL TRUST and
SWENSON FAMILY TRUST

By and through their attorneys,

WIGGIN & NOURIE,
PROFESSIONAL ASSOCIATION

Dated: November 25 , 1998

Plaintiffs' Requests for Findings of Fact and Rulings of Law with Exhibits

By: /s/ ____________________
W. Wright Danenbarger
20 Market Street
Manchester, NH 03101
(603)669-2211

NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION, et al.

By their attorneys

PHILIP T. McLAUGHLIN
ATTORNEY GENERAL

Dated: November 24 , 1998

By: /s/ ____________________
Martin P. Honigberg
Senior Assistant Attorneys General
Civil Bureau
33 Capitol Street Concord, NH
03301-6308
(603)271-3658

Approved:

Dated: ____________________

____
Presiding Justice

APPENDIX F

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

95-E-059

ERNEST T. SMITH, III & alia

v.

N.H. DEPARTMENT OF REVENUE ADMINISTRATION & alia

FINDINGS OF FACT AND LAW

NOW COMES the Defendant, New Hampshire Department of Revenue Administration by and through its attorney, Philip T. McLaughlin, Attorney General for the State of New Hampshire, and submits the following Findings of Fact and Law in the above referenced matter:

STANDARD OF REVIEW

A. Commerce Clause Standard

1. This matter comes before the Court on remand from the New Hampshire Supreme Court for determination of two issues: first, whether the Plaintiffs are entitled to a specific remedy with respect to the State's stipulation that the former exemptions for in-state bank-related income under the

interest and dividends tax, RSA 77:4, I, II facially violated the Commerce Clause; and, second, whether the former exemptions for in-state bank interest ("the former exemptions") had the effect of violating the Commerce Clause with respect to out-of-state non-bank interest and dividend income. G (Consistent with Court's Order)

2. The standard for review of the Plaintiffs' claims by this Court is set by the terms of the Supreme Court's remand order and, with respect to the Plaintiffs' Commerce Clause claim, by established United States Supreme Court precedent. G

3. Under the remand order, "[P]etitioners must offer evidence to support 'a precise determination of the extent of the discrimination' against out-of-state non-bank issuers of financial instruments allegedly caused by the former exemption instate income under RSA 77." *Smith v. Dept. of Revenue,* 141 N.H. at 696-97 (1997) *(quoting Maryland v. Louisiana, 451* U.S. 725,759-60 (1981)). G

4. To precisely determine the extent of discrimination, Plaintiffs must show that the challenged statute had a "demonstrable effect" on interstate commerce. *Exxon Corp. v. Maryland,* 437 U.S. 117, 126 (1978). G

5. It is not sufficient to show for Plaintiffs to show a hypothetical possibility of competition between New Hampshire bank instruments and out-of-state nonbank investment vehicles. Rather Plaintiffs must provide objective and empirical evidence of *actual competition in an identified market* between New Hampshire bank instruments and out-of-

state nonbank investment vehicles. *General Motors Corp. v. Tracey,* 519 U.S. 278 (1997). G

6. Proof of discrimination requires that the Plaintiffs demonstrate that the former exemptions had an actual effect on an identified market. *Smith,* 141 N.H. at 696-97. G

7. The New Hampshire Supreme Court found as a factual matter that "banks are different" from other business organizations, including financial service organizations, *id.* at 688-91. G

8. To meet their burden of proof of discrimination, the Plaintiffs must demonstrate that, despite the differences between banks and other organizations (i) bank financial products are in actual and direct competition with other financial products and (ii) bank products are purchased and sold in the same geographical market as other financial products.
(i) G
(ii) Neither G nor D

9. The Plaintiffs did not present empirical evidence that shows that despite the distinct characteristics of banks, *see Smith* at 689, depository and equity instruments issued by New Hampshire banks compete in the same market with out-of-state non-bank investment instruments. *Id.* at 696-97. G

10. A hypothetical possibility of favoritism does not constitute discrimination that transgresses the Commerce Clause. *Associated Industries v. Lohman,* 511 U.S. 641, 654 (1994). The focus of this Court's Commerce Clause analysis

must be on whether the challenged statutory provisions are discriminatory in effect. G

11. The Commerce Clause protects markets and market participants, such as financial institutions' and businesses' access to capital investment. *Smith at 691. See,* e.g., *Fulton v. Faulkner,* 561 U.S. 325 (1996); *Bacchus Imports Ltd. v. Dias,* 468 U.S. 263 (1984); *Maryland v. Louisiana,* 451 U.S. 725 (1981); *Boston Stock Exchange v. State Tax Common,* 429 U.S. 318 (1977). G

12. The Commerce Clause does not operate to protect individual investors. *General Motors v. Tracy, 519 U.S. 278 (1977).* G

13. The Commerce Clause does not protect the in-state nonbank financial market. Accordingly, no Commerce Clause violation may be found as to taxes paid on interest and dividends paid on in-state financial instruments, nor may a Commerce Clause violation be found as to taxes paid on dividends received from New Hampshire bank holding companies. G

B. Standard For A Tax Refund Remedy

14. New Hampshire law provides for a tax refund for unconstitutional taxes only as to those persons who can demonstrate that they bore the economic burden of the tax. *Cagan's Inc. v. Department of Revenue Administration,* 126 N.H. 239, 183-85 (1986)("In order to be entitled to a refund under a tax statute, the party seeking the refund must have borne the economic burden of the tax."). G

15. Plaintiffs did not present evidence that the class members bore the actual economic burden of the tax exemptions at issue here. D

16. Evidence that the class members paid the tax does not establish that they bore the economic burden of the tax. D

17. Were evidence of payment alone sufficient to establish economic burden, the state would be potentially subject to a claim for damages for a supply side, as well as a demand side violation. Neither G nor D

18. The class members either *benefitted* from the tax exemption itself, or, as rational investors, sought returns from out-of-state investments which compensated for any putative benefit accruing to in-state bank deposits or dividends. *(Testimony of Professor Dennis E. Logue)* ("Logue Testimony"). Neither G nor D

19. Plaintiffs did not prove harm or damage from the operation of the tax exemptions at issue in this case.
G (as to non-bank investment products)

C. The Interest & Dividends Tax

20. The interest and dividends tax exemption for in-state banks affected the following instruments and services:

(a) bank demand deposit accounts, including checking accounts and negotiable order of withdrawal accounts (NOW Accounts);

(b) bank savings accounts;

(c) fixed rate certificates of deposit;

(d) bank money market instruments.

(Stanley Arnold, Ex. D5) G

21. The interest and dividends tax exemption for in-state bank income also exempted income in the form of dividends from New Hampshire based stock banks during the relevant time period. *(Stanley Arnold, Ex. D5).* G

22. Interest earned on federal debt instruments, such as treasury notes, bills and bonds, is not subject to taxation under the Interest and Dividends Tax. *RSA Chapter 77.* Neither G nor D

23. Interest earned on debt instruments issued by states or municipalities outside of New Hampshire is not part of the class of assets at issue in this case. G

24. Between 1991 and 1 994, six independent stock banks in New Hampshire paid dividends that were exempt from taxation. *(Ex. D20, D16-D19, Stipulation by the parties).* G

25. Those six New Hampshire banks were Berlin City Bank, Centerpoint Bank, Woodsville Guaranty Savings Bank, Lancaster National Bank, Siwooganock Savings Bank and Community Bank & Trust Co. (Ex. *D20, D16-D19, Stipulation by the parties).* G

26. The yearly dividend payments of these banks were as follows:

Gross Bank Dividends by Year
(In Thousands)

	1991	1992	1993	1994
Berlin	111	316	380	399
Centerpoint	0	0	0	61
Community	0	0	73	81
Lancaster				
Siwooganock	0	0	0	21
Woodsville	98	115	124	156
	209	431	577	718

(Ex. D16-D19)

TOTAL: $1,935,000.00 (plus Lancaster National Bank for which no data is available from New Hampshire Banking Department records)

(Lancaster National Bank dividends for 1993-94 available in Ex. D115)

D. Standard For Determining Competition

27. Plaintiffs' evidence did not show an observable or measurable effect on the capacity of the sellers of investment securities to effectively compete with New Hampshire banks in seeking investment capital from New Hampshire citizens. G

28. Professor Dermis E. Logue testified that competition between financial instruments is established by two considerations: (i) that all financial instruments are theoretically available to all consumers for purchase; and (ii) that all payers of interest and dividends on financial instruments are in competition for investment dollars from all consumers, including New Hampshire bank depositors and owners of New Hampshire bank equity securities. G

29. Professor Logue's testimony and report did not include any empirical evidence by which this court could determine whether the former exemptions had an actual price effect on a defined interstate market for nonbank investment instruments. G

30. Professor Logue supported his theory with two analyses: (i) a series of correlation analyses to establish that rates of return on certain nationally traded financial instruments tend, over time to move together in a predictable fashion; and (it) a comparison of interest rates on a six-month negotiable rate secondary market CD to a pair of national stock market indices to determine that stock prices generally move in opposite directions from prevailing interest rates. G

31. The Logue analyses demonstrate the commonly understood fact that, in a national economy, interest rates on nationally traded fixed income instruments tend to move in tandem, and that when interest rates rise in the national economy, stock prices tend to decline. This is not a surprising finding; indeed, Professor Logue himself characterized his finding as "self-evident." *Logue Testimony.* G

32. Evidence of interest rate correlation is not probative that New Hampshire bank depository products and services compete in the same product or geographic market as out-of-state non-bank investment instruments with any non-bank investment vehicle. G

33. In conducting his analysis, Professor Logue used a six-month negotiable rate certificate of deposit as a "proxy" for all bank depository products. *(Plaintiffs Ex. 10)* The six month negotiable rate DC is a secondary market instrument, generally available only to institutional investors in denominations greater than $100,000. *(Marc Hebert, Margaret E. Guerin-Calvert, Ex. D50, D51)* This instrument is neither representative nor comparable to bank depository instruments actually held by taxpayers in the plaintiff class. *(Margaret E. Guerin-Calvert.)* G

34. No representative plaintiff held a six-month negotiable rate certificate of deposit during the relevant time period. *(Ex. D78 through D92, and D94 through D97.)* G

35. Plaintiffs presented no evidence that any class member held a six-month negotiable rate certificate of deposit during the relevant time period. G

36. The elements of risk, convenience and liquidity are not lesser attributes of financial products. Differences of attributes or function among products may cause similar products to be used so differently by consumers that the products are in fact in separate markets, and are therefore not in competition. *See, Testimony of Margaret E. Guerin-Calvert* G

37. Consumer preference for the convenience of local checking, ATM access and other factors generally cause consumers to treat checking accounts and other bank depositing accounts as local products or services. G

38. The competitive analysis of bank services traditionally used by the Federal Reserve Board and Department of Justice as set out in the testimony of Margaret E. Guerin-Calvert recognizes that differences in use of similar products may place the products in different markets. *See, Guerin-Calvert Testimony; Survey of Consumer Finance Data. Guerin-Calvert Supplemental Report.* Defendant's Exhibit 51 Tab 3 (vast majority of consumers bank within 50 miles of home. G

39. The functions and attributes of bank financial services place them in separate product and geographic markets from nonbank financial instruments. G

40. Professor Logue testified that the effect of the former tax exemptions must be "that New Hampshire investors would choose to hold a larger fraction of their financial wealth as deposits or investments in New Hampshire than they would have absent the tax-advantaged status of those investments. According to Professor Logue, the effect of the

tax exemption was to cause New Hampshire residents to hold fewer out-of-state securities than they might otherwise have held." *Logue Testimony, Logue Expert's Report, Plaintiffs' Exhibit 10,* at 10. G

41. The Plaintiffs provided no evidence or empirical data to test or to confirm Professor Logue's prediction as to disproportionate holdings. G

42. The testimony of Professor Logue that the effect of the tax on consumer behavior and on commerce in out-of-state nonbank securities is probably "statistically undetectable" does not meet the standard set by the Supreme Court of evidence supporting "a precise determination of the extent of the discrimination" with respect to out-of-state nonbank income. *Testimony of Logue. Smith* at 696. *See also Assoc. Industries v. Lohman,* 511 U.S. 641, 655 (1994). G

43. New Hampshire Banking Department records of depository levels and interest rates for a comprehensive range of depository accounts offered by New Hampshire banks during the period 1991 through 1995 show (i) no significant outflow of deposits from New Hampshire banks following the repeal of the exemptions; and (ii) no evidence that New Hampshire banks adjusted their interest rates following the repeal. G

44. Under the standards for measurement of competition routinely used by the Federal Reserve Board and the Department of Justice, New Hampshire bank data shows that New Hampshire depository accounts are not viewed by either consumers or New Hampshire bankers as competitive with other non-bank investments. G

45. No representative plaintiff made any significant adjustment in their investment portfolio after, and as a consequence of, the repeal. G

46. At least three New Hampshire bankers did not consider out-of-state nonbank investments (other than treasury securities) when establishing interest rates on depository accounts or dividend rates on their equity stock; and made no adjustments to either in the wake of the repeal of the former exemptions. *Testimony of James Seppala, Richard Gagne, Paul Campagna.* G

47. Similar correlations to those identified by Professor Logue could be found by comparing interest rates on fixed income instruments to loan products such as home mortgages. This does not prove that loan products are in the same product market as, and do not compete with, bank depository instruments. *Testimony of Logue (cross-examination), Testimony of Guerin-Calvert* G

48. That two products are income generating does not establish that vastly disparate products, such as bank depository accounts and life insurance contracts, are functional substitutes in the eyes of consumers, or of competitors in a defined market. G

49. Insurance products are significantly different from bank products because insurance products provide a death benefit. Under federal guidelines, insurance products and bank depository products are in different product markets. G

50. Annuity products are significantly different from bank products because annuity products offer tax deferred features and associated federal tax penalties for each withdrawal under federal guidelines. Annuity products and bank depository products are in different product markets. G

51. Portfolio practices of mutual funds or commercial money market funds is not proof of whether and how individual consumers use bank depository instruments. Accordingly, evidence of the portfolio practices of mutual funds and commercial money market funds is not proof bank depository accounts compete with non bank investment vehicles in a defined product market. G

E. The State's Competition Analysis

52. The federal merger guidelines summarized in the 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines provide a comprehensive analytical framework for assessing competition in the banking and financial services industries. Economists, businesses and federal regulatory agencies have used this standard for more than 20 years to measure competition in the financial services and other industries under the principles of applied industrial economics. *Testimony of Guerin-Calvert.* G

53. The Merger Guidelines are standard analytical tools to measure competition in a variety of business contexts, ranging from antitrust analysis to competitive impact reviews of environmental regulation. *Testimony of Guerin-Calvert.* This standard is an appropriate analytical method by which to

measure actual competition between New Hampshire bank depository accounts and equities and non-bank financial instruments. G

54. This standard measures competition by examining the characteristics and attributes of products to determine a product market. A product market is defined as the range of products to which consumers would turn in response to a significant, non-transitory price increase for a given product. Substitutable or competitive products are those products to which consumers would turn for similar functions or uses. *Testimony of Guerin-Calvert.* G

55. Under the Guidelines, economists typically examine the effect of a 5% price increase. *Horizontal Merger Guidelines State's Exhibit D52.* This level of price increase is generally used as a benchmark for a price increase which is likely to induce consumers to switch to competitive products, or to induce producers of potentially substitutable products to engage in competitive marketing. G

56. Use of the 5% benchmark does not suggest that lesser price increases--such as that represented by the diminished after tax-return on New Hampshire depository accounts in the wake of the repeal of the former exemptions--would not also lead to observable or measurable effects on consumer and competitor behavior or activity. *Testimony of Guerin-Calvert.* G

57. The geographic scope of a product market is determined by examining the location of offerors of such competitive goods or services and reviewing objective empirical data concerning consumer behavior and actions by

possible competitors. *Testimony of Guerin-Calvert, Expert's Report of Guerin-Calvert,* State's Exhibit D 50, and tab 2; *Horizontal Merger Guidelines,* State's Exhibit 52. G

58. Core attributes of bank depository services, such as transactional capabilities, predictability of return and risk protection provided by federal insurance distinguish them for competitive purposes from non-bank financial instruments such as stocks, bonds, money market instruments and mutual funds. *Testimony of Guerin-Calvert.* G

59. The Federal Reserve Board, which has primary federal jurisdiction over banks and bank products, has determined that bank depository products compete in local geographic markets only with other bank depository products. Neither G nor D

60. Bank depository accounts and instruments do not compete in the same product or geographic market with all other possible investment vehicles. *Testimony of Guerin-Calvert.* G

61. The majority of consumers have transactional bank accounts from local institutions which are located within 50 miles of their homes. Survey of Consumer Finances. *Addendum to Report of Margaret E. Guerin-Calvert, Exhibit D 5 1* G

62. Many consumers who have transactional bank accounts also use commercial money market accounts. This suggests that consumers view such accounts as performing different, complementary functions, rather than as competitive alternatives. *Testimony of Guerin-Calvert.* G

63. Commercial money market accounts function as a temporary "parking place" for funds generated by trades in brokerage or trust accounts. *Testimony of Guerin-Calvert, Testimony of Marc Hebert, Testimony of David Ruedig, Testimony of William Morrison.* Such a use is complementary and not competitive with transactional bank accounts. G

64. Commercial money market accounts are not federally insured. *(David Ruedig, Margaret E. Guerin-Calvert, Marc Herbert, Ex. D100, D120).* Commercial money market account prospectuses contain specific advisories to consumers that they are not federally insured and therefore carry a risk of loss of principal. *Testimony of David Ruedig, Dennis E. Logue.* G

65. Commercial money market accounts are not in the same product market as bank money market accounts or transactional accounts because consumers use them for different purposes. *(Margaret E. Guerin-Calvert).* G

66. New Hampshire Banking Department records show that depositors did not withdraw their deposits from New Hampshire depository accounts when the former exemptions were repealed. Similarly, banks made no systemic adjustments in their interest rates in response to the repeal of the former exemptions. *Testimony of Guerin-Calvert.* G

67. Bank depository products are generally not included in investment portfolios. *Testimony of Marc Hebert.* G

68. Bank instruments, including bank depository accounts, are not generally substitutable for equity

investments because of differences in use, attributes and function associated with equity investments. G

69. Based on their use, attributes and function, bank depository accounts and instruments are not in competition with equity instruments in a defined product or geographic market. G

70. Bank depository accounts do not compete in a national or global market with all possible financial instruments in New Hampshire. Generally bank depository products are priced based on a localized market consisting of other banks located in or near their local communities. *Testimony of Gagne, Seppala, Campagna.* G

71. Bank depository accounts, including certificates of deposit, are offered primarily as transactional accounts and maintained primarily for the purpose of convenience. *(Margaret E. Guerin-Calvert, Ex. D67; Marc Hebert).* G

72. Banks draw their depository customers from a narrow geographical area, which generally encompasses only the community in which the bank is located. *(Margaret E. Guerin-Calvert, Ex. D50, D67).* G

73. All bank depository products are federally insured up to $100,000 and pose no risk of any loss of principal up to that amount. *(Margaret E. Guerin-Calvert, Marc Hebert, Ex. D100, D120)* G

74. Bank depository products, ranging from checking and savings transactional accounts through certificates of deposit, are not available except through a

bank. The purchase of a bank depository product generally requires a visit to a bank for the purpose of opening an account or obtaining a certificate of deposit. G

75. Bank depository accounts do not compete in the same geographic market as out-of-state bank accounts. *(Margaret E. Guerin-Calvert, Ex. D50, D67; James Seppala, Ex. D115, Richard Gagne, Ex. D116, Paul Campagna, Ex. D117)* G

76. Certificates of deposit are within the cluster of services which the Federal Reserve Board views as not in competition with nonbank financial instruments in a defined product or geographic market. Neither G nor D

F. Portfolio Theory And Asset Allocation

77. Financial advisors, acting on behalf of their clients, typically construct portfolios for their clients using "asset allocation models." (*Marc Herbert, Ex. D69, D93, David Ruedig, Dennis E. Logue, Thomas Morrison, Harold Sullivan.*) G

78. Under asset allocation models, financial advisors structure portfolios by attempting to diversify an investor's holdings among asset classes. (*J.P. Singh, Marc Hebert, Ex. D69, D93*). G

79. Under this form of portfolio management, financial instruments or types of financial instruments may compete within asset classes but instruments within one asset class do not generally compete with instruments within

another asset class. (*J.P. Singh, Marc Hebert, Ex. D69, D93*) G

80. Investment advisors do not generally consider bank transactional accounts as belonging within any asset class in an investment portfolio. *(Marc Hebert).* G

81. Equity securities constitute a distinct asset class, which is not comparable to, or substitutable for, fixed-income instruments. *(J.P. Singh, Marc Hebert, Margaret E. Guerin-Calvert).* G

82. There is no private or government insurance available to guarantee the principal placed at risk for investments in equity securities or private debt instruments. G

83. Private debt or equity instruments are not substitutable for and do not compete with bank depository products in a defined product market. *(Marc Hebert, Margaret E. Guerin-Calvert).* G

84. Mutual funds, including money market mutual funds, are investment instruments by which individual investors may affordably obtain the benefits of a diversified portfolio of investment securities. *(Marc Hebert, Margaret E. Guerin-Calvert)* G

85. Mutual funds offer investors the benefits of professional fund management. G

86. Mutual funds do not compete in any defined product or geographic market with bank depository accounts and instruments. G

87. The possibility that investors may from time to time, rebalance portfolio holdings among asset classes does not establish that all investment instruments compete across all asset classes within a defined product or geographic market. *Testimony of Logue, Morrison, Ruedig.* G

H. Bank Dividends

88. No New Hampshire bank shares that paid tax-exempt dividends to investors were publicly traded during the relevant time period. *(Ex. D16, D17, D18, D19).* G

89. The stock of the six New Hampshire stock banks which paid dividends to shareholders during was not traded in any defined market. G

90. Shares of local stock banks were traded rarely, if at all during the relevant period, through an informal auction process. *Testimony of Seppala, Gagne, Campagna, Ruedig, Morrison, Hebert. See also Testimony of Logue* (same process followed at Ledyard National Bank). G

91. The auction process typically involved contacting the bank, enrolling on a list of interested parties, and waiting for the opportunity to make odd-lot purchases as stock became available for a variety of reasons including death and divorce. *Testimony of Seppala, Gagne, Campagna, Ruedig, Morrison, Hebert. See also Testimony of Logue.* G

92. The market for the stock of New Hampshire banks that paid exempt dividends during the relevant time period was private and localized (*James Seppala, Ex. D115; Richard Gagne, Ex. D116; Paul Campagna, Ex. D117*) G

93. The stock of New Hampshire stock banks was held principally by officers, directors, employees, initial investors, immediate relatives of those persons, and members of the local community. *(James Seppala; Richard Gagne, Ex. D116; Paul Campagna)*. G

94. Through 1998, New Hampshire law required that bank directors hold "qualifying shares" of stock in the stock banks. RSA 384:3. G

95. No market mechanism existed for setting stock price of exempt bank shares. G

96. Because local bank stock is privately held and rarely traded it is not substitutable for publicly-traded stock. G

97. The stock of New Hampshire stock banks was not priced and did not pay dividends in response to a price or dividend policy of nationally traded equities, or other actively traded financial instruments. G

98. In some cases, investors sought to purchase equity shares of some New Hampshire banks during the late 1980's and early 1990's in the context of bank mergers and acquisitions throughout the northeast United States. *Testimony of Hebert, Logue, Morrison* (characterizing New Hampshire bank stock as "dot-coms of the 1990's). Any gains, if

realized, from such purchases would have been subject to ordinary capital gains treatment under federal law and would not have been subject to the interest and dividend tax. G

99. The stock of New Hampshire banks which paid exempt dividends to taxpayers between 1991 and 1994 did not compete in the same product or geographic market as equity securities, or other investment instruments. *(Margaret E. Guerin-Calvert, Ex. D50, D52).* G

I. History Of The Interest And Dividends Tax

100. The New Hampshire interest and dividends tax was enacted in 1923. The tax applied to interest and dividends received by New Hampshire citizens above a personal exemption in the amount of $1,200, and was also subject to certain other exemptions. *(Stanley Arnold)* G

101. Under former RSA 77:4, I, interest upon any "deposits in any credit union, savings bank, building and loan association, or saving department of any loan and trust company or national bank in this state or in those of any state which exempts from taxation the principal or income of deposits in such institutions in this state owned by residents of that state." This section excluded from taxation interest paid on depository instruments by New Hampshire banks and Vermont banks. G

102. Under former RSA 77:4, II income in the form of dividends paid by "New Hampshire State banks, trust companies, building and loan associations, credit unions or national banks" was exempted from taxation. G

103. Dividend income from New Hampshire bank holding companies was not exempted from taxation. *(Stanley Arnold, Ex. D5)* G

104. The interest and dividends tax works in tandem with the bank franchise tax, RSA Chapter 84. During the relevant period, the subject of both taxes was interest and dividend income from New Hampshire banks. *(Offer of Proof with Respect to V. Hummel Berghaus; Testimony Summarized in Affidavit of Berghaus, submitted in connection with State's Motion For Partial Summary Judgment) ("Berghaus").* Neither G nor D

105. Historically, the bank franchise tax was imposed on the value of deposits held by N.H. banks. In 1961, the form of the tax was altered to levy against income generated by such deposits in the form of interest and on dividends paid on capital stock. *(Berghaus).* Neither G nor D

106. The bank franchise tax was imposed on depositors' or shareholders' holdings in the bank and the bank was treated as a transmitting agent. Under the bank franchise tax, New Hampshire banks were treated in the same manner as employers are treated with respect to federal social security withholding. That is, the banks transmitted a tax payment on their depositors' holdings, but were not themselves considered the taxed entity with respect to those holdings. *Berghaus.* Neither G nor D

107. In 1923, the New Hampshire interest and dividend tax was enacted. One of the principal features of the interest and dividends tax was the exclusion from taxation of

New Hampshire bank interest and dividends. *(Stanley Arnold, Berghaus).* G

108. The exemption for New Hampshire bank interest and dividends was not intended to favor or provide a tax preference to local banks, but rather was designed to ensure that a single stream of income - the value of interest and dividends generated by New Hampshire bank depository instruments and stock - was not taxed twice: first at the bank level under the bank franchise tax and again at the depositor level under the interest and dividends tax.) *(Berghaus).* D

109. No other generator of interest or dividends in New Hampshire is directly subject to tax on that income. *(Berghaus).* Neither G nor D

110. The particularized treatment of New Hampshire interest and dividends was designed to compensate for the taxation of interest and dividends at the bank level under the bank franchise tax. *(Berghaus).* Neither G nor D

111. A fiscal note prepared by the Department of Revenue in 1990 in connection with the proposed repeal of the bank franchise tax reported that the bank franchise tax revenues for 1990 were $13,105,393. *(Stanley Arnold, Ex. D44)*. For the same period, the amount of tax revenue forgone by the State of New Hampshire under the interest and dividends tax exemption at issue in this case was approximately $13.6 million. *(Stanley Arnold, Ex. D6, D45).* The closeness of these numbers shows that the bank franchise tax and the exemption applied to a substantially similar stream of revenue. *(Stanley Arnold).* Neither G nor D

112. The interest and dividends tax exemption for in-state bank income was repealed by the legislature in 1995. At the same time, the level of the personal exemption under RSA 77 was increased from $1,200 to $2,400. *(Stanley Arnold, Ex.* D13). G

J. Dispositive Findings

113. New Hampshire bank depository instruments do not compete in the same geographic market as out-of-state bank depository instruments. G (generally speaking)

114. New Hampshire bank depository instruments do not compete in the same product or geographic market as out-of-state nonbank investment instruments. G

115. New Hampshire bank depository instruments do not compete in the same product market as other New Hampshire non-bank financial investments. G

116. Exempt New Hampshire bank stock does not compete in the same product or geographic market as other equity securities or other investment vehicles. G

117. New Hampshire bank instruments do not compete with annuity products in a defined product or geographic market. G

118. New Hampshire bank instruments do not compete with insurance products in a defined product or geographic market. G

119. New Hampshire bank instruments do not compete with commercial money market funds in a defined product or geographic market. G

120. New Hampshire bank instruments do not compete with mutual funds in a defined product or geographic market. G

121. Plaintiffs have not established that they were injured by, or bore the economic burden of the tax at issue in this case. Therefore they are not entitled to a refund remedy as claimed, either with regard to the stipulated facial violation of the Commerce Clause with respect to out-of-state bank income, or with respect to plaintiff's broader claim that the effect of the statute was to discriminate against other out-of-state nonbank investment instruments. D

122. RSA Chapter 77 and the former exemptions for in-state bank income did not violate the Commerce Clause with respect to out-of-state nonbank investment vehicles. G

123. RSA Chapter 77 and the former exemptions did not violate the Commerce Clause with respect to in-state investments. G

124. Plaintiffs are not entitled to damages in this matter. D

Respectfully submitted,

NEW HAMPSHIRE DEPARTMENT OF
REVENUE ADMINISTRATION, &. A.

By their attorneys,

PHILIP T. MCLAUGHLIN
ATTORNEY GENERAL

June 7, 2000

/s/ ______________________________
Walter L. Maroney, NH Bar #8206
Senior Assistant Attorney General
Civil Bureau
33 Capitol Street
Concord, New Hampshire 03301-6397
(603) 271-3658

Certification

June 7, 2000

I certify that a copy, of the foregoing was served this day, to all counsel of record through Michael C. Harvell, Esquire, Sheehan, Phinney, Bass & Green, 1000 Elm St., P.O. Box 3701, Manchester, NH 03105.

/s/ ____________________
Walter L. Maroney

APPENDIX G

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

ERNEST T. SMITH, III et al.

v.

N.H. DEPARTMENT OF REVENUE ADMINISTRATION et al.

Docket No. 95-E-059

PLAINTIFFS' MOTION FOR RECONSIDERATION

NOW COME the undersigned Class Counsel and submit the following Plaintiffs' Motion for Reconsideration regarding the Court's August 10, 2000 Order in this case. In support thereof, Plaintiffs state as follows:

I. Introduction

1. This class action arises from the Plaintiff taxpayers' payment of Interest and Dividends during 1991-1994 as required by the version of RSA 77 which was then in effect. Following Plaintiffs' initiation of this action and its transfer to the New Hampshire Supreme Court, the Supreme Court found that RSA 77 discriminated against interstate commerce in violation of the Federal Commerce Clause. Smith v. N.H. Dep't of Revenue Admin, 141 N.H. 681, 692

A.2d 486 (1997). The Smith Court then remanded this case for a trial limited to "a factual determination of whether New Hampshire bank interest and dividends compete with other sources of investment income such as stock dividends and bond interest." Id., at 696.

2. Beginning on May 22, 2000, there was a six-day hearing of this remanded case before this Court (McGuire, J.). On August 10, 2000 this Court issued an Order ("Order") that Plaintiffs "be given a partial refund of the I&D taxes they paid between 1991 and 1994." Order, p. 1. Specifically, the Court found that Plaintiffs "are entitled to a refund of all New Hampshire I&D taxes paid for the years 1991 through 1994 on: (1) interest on any deposits or other investment products in out-of-state banks; and (2) dividends from stock on out-of-state stock banks." Id., p. 22.

3. For the reasons set forth below, Plaintiffs ask the Court to reconsider both its Order and its corresponding rulings on certain of the parties' respective requests for findings of fact and rulings of law. Upon the Court's reconsideration, Plaintiffs request that the Court modify its Order to find that Plaintiffs are entitled to a full refund of all taxes paid on interest and dividends from 1991-1994 and that the Court modify its rulings on Plaintiffs' Requests for Findings of Fact and Rulings of Law as set forth infra.

II. Argument

4. Pursuant to N.H. Super. Ct. R. 59-A, the Court may reconsider points of law or fact that the Court has previously overlooked or misapprehended in its Order.

Plaintiffs request that the Court reconsider the following points of law or fact.[1]

5. As an initial matter, the Court misapprehended the Smith case as standing for the proposition that RSA 77 facially discriminates against only out-of-state banks, when the Smith court held that there was facial discrimination against interstate commerce. Smith, at 695-696. The Court's misreading of Smith has significant consequences because it drives the remainder of the Court's analysis.

6. The Court first posited that the Smith court found "facial discrimination as between in-state and out-of-state banks..." Order, p. 7, fn 1. Hence. the Court rationalized, the Court was not required to conduct any further analysis of the "actual effect" of the exemptions upon other sources of investment income. Id. This analysis overlooks what Smith expressly required the Court to do, i.e. make "a factual determination of whether New Hampshire bank interest and dividends compete with other sources of investment income..." Smith, at 696. Taking the Court's analysis to its logical conclusion, if the Smith court had determined that there was facial discrimination only as between in-state and out-of-state bank interest and dividend bearing investments, there would be no need for the Smith court to have remanded the case. It simply could have ordered the State to pay a refund.

---

[1] Plaintiffs reserve the right to raise on appeal issues in addition to the points of law and fact raised in this motion, to the extent that an appeal is necessary.

7. The Court's misapprehension of the Smith decision also affects the Court's eventual analysis of "whether the unconstitutional discrimination against out-of-state banks extended to other non-bank sources of investment income..." Order, p. 9. The Court, based on its reading of Smith, essentially finds that Plaintiffs must prove actual effect of the discrimination and to do so, Plaintiffs must prove competition. Without giving any definition of competition (other than an "economic counterparts" analysis discussed infra), the Court apparently reads Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049 (1984) to mean that only products subject to facial discrimination can compete with one another. This brings the Court's misapprehension of Smith full circle. Because the Court believes that Smith held that RSA 77 only facially discriminated against in-state and out-of-state bank investments, the remaining investment interests cannot compete with bank source investments in the Court's view. Plaintiffs respectfully suggest that this analysis is incorrect and contrary to both Smith and the evidence adduced in this case.

8. The Court also misapprehended relevant case law as imposing some heightened standard on Plaintiffs to demonstrate the magnitude, and not just the existence, of competition between favored New Hampshire bank sources and interstate investments. In fact, the U.S. Supreme Court has never required the magnitude of discrimination be proven and has repeatedly refused to permit states to justify the impact of discriminatory statutes as "de minimis." Plaintiffs' Pretrial Memorandum of Law ("PPM"), pp. 13-15, citing Bacchus, supra; Fulton Corp. v. Faulkner, 516 U.S. 325, 116 S.Ct. 848 (1997).

9. The Court found that Plaintiffs "produced no evidence tending to show that any out-of-state non-bank sources of investment income were actually affected by the exemptions at issue." Order, p.8. In fact, the Court overlooked uncontroverted evidence, through the testimony of Mr. Sullivan and Mr. Hebert that non-bank sources that had out-of-state branches or offices were actually affected by the exemptions at issue. See Plaintiffs Requests for Findings of Fact and Rulings of Law, "Plaintiffs' Requests," Request Nos. 56-57.[2]

10. Plaintiffs request the Court to reconsider its finding that Plaintiffs did not "produce any evidence tending to show that any investor ever chose a New Hampshire bank product instead of an out-of-state non-bank investment because of the RSA 77:4 tax exemptions." Order, p. 9 (emphasis added). Mr. Sullivan testified that, based on his own observations and experiences, the Interest and Dividends tax was one factor in determining where investors would place their money and many I&D taxpayers invested in order to take advantage of the exemptions. Plaintiffs' Request Nos. 56-57, 59. Mr. Ruedig testified that in his work with Paine Webber clients, clients reallocated assets including bank products and bank stock between asset classes, and Mr. Ruedig discussed the I&D tax with clients in advising them concerning investments. Plaintiffs' Post Trial Memorandum of Law ("PTM"), p. 21.

---

[2] The Court actually granted Plaintiffs' Requests Nos. 56-57 subject to the qualifications that Request No. 56 was granted "consistent with the Court's order" and that Request No. 57 was granted "as to out-of-state banks." Order, p.22.

11. The Court held that the Plaintiffs' proof of actual effect on the market depended on a "theoretical approach to the global financial market" and hence was "inadequate to prove actual effect and competition for purposes of proving entitlement to a remedy." Order, p. 9. The Court overlooks the specific evidence Plaintiffs adduced concerning competition, including the uncontroverted testimony of Messrs. Sullivan, Hebert, Morrison, Ruedig and Logue. See Plaintiffs' Requests Nos. 51-52, 54, 61-66; compare Plaintiffs' Request No. 131 (Court found that Seacoast Savings Bank was publicly traded) with Order, p. 19, fn 3 (Court found that New Hampshire bank stock was not publicly traded). For example, Mr. Hebert acknowledged that investors moved funds from stocks into savings accounts and that these two types of investments would be in competition with one another. PTM, p. 9. Both Dr. Logue and Ms. Guerin-Calvert testified the tax-exempt status of bank products would affect an investor's decision of how much stock to sell and convert to cash equivalents in the course of portfolio rebalancing. The Court also misapprehends relevant case law that does not limit the manner in which Plaintiffs may establish competition. See e.g. Bacchus, supra. Under the relevant cases, competition may be presumed if a statute is found to facially discriminate and thus violate the Commerce Clause. Further, courts have not held that competition cannot be proven through an analysis of financial markets and courts certainly have not required plaintiffs to demonstrate actual effect or demonstrable harm through evidence of how each and every effected entity has suffered harm from the constitutional violation.

12. The Court should reconsider its holding that, assuming the Smith court intended the Court to address this

issue on remand, Plaintiffs did not prevail on the question of whether "the unconstitutional discrimination against out-of-state banks extended to other non-bank sources of investment income." Order, p. 9. First, the Smith court clearly intended that this question be resolved on remand. Smith, at 696. Second, Plaintiffs established that the unconstitutional discrimination at issue in fact extended to non-bank sources of investment income. Plaintiffs' Request Nos. 64, 66, 70, 77, 85, 87-89, 90(a)-(h), 92, 97-98, 101-105, 109-110, 116, 120, 122-123, 132, 134, 135(f)-(o).

13. The Court misapprehended the relevant law to somehow require a showing that favored New Hampshire bank products were "economic counterparts" of out-of-state non-bank sources of investment income. Order, p. 13. There is no case law that requires any showing that favored New Hampshire bank products and interstate non-bank sources of investment income are "economic counterparts," and the Bacchus case cannot be read to impose such an "economic counterpart" requirement. The Court thus implicitly adopts State expert Meg Guerin-Calvert's anti-trust model that, as Professor Logue explained, is inappropriate to measure competition between New Hampshire bank deposit products and bank stock and interstate non-bank investments. Plaintiffs' Request No. 148. In implicitly adopting Ms. Guerin-Calvert's analysis of competition, the Court overlooks how Professor Logue discredited this anti-trust model, how the State's own witness James Seppala undermined Ms. Guerin-Calvert's regression analysis, and Plaintiffs' analysis of why this anti-trust model cannot apply to analyze whether products compete in violation of the Commerce Clause. PTM, pp. 22 and 46-51. In Commerce Clause cases the U.S. Supreme Court has repeatedly rejected the type of complex economic analysis that

Ms. Guerin-Calvert's anti-trust model necessarily entails. PTM, p. 51 ; PPM, p. 29; Fulton, supra, 516 U.S. at 341-43, 116 S.Ct. at 859; General Motors Corporation v. Tracy, 519 U.S. 278, 307-09, 117 S.Ct. 811,828-29 (1997).

14. Further, the Court's "economic counterparts" analysis effectively elevates New Hampshire State constitutional analysis (i.e. classes of property vs. classes of taxpayers under Part 2, Art. 6) over Federal constitutional analysis. This case now involves only a Federal constitutional issue and hence only Federal constitutional law applies.

15. Even assuming arguendo that the Court's "economic counterparts" analysis is correct, the Court has overlooked evidence that the interstate investments at issue are economic counterparts to favored New Hampshire bank products and stock. The Court expressly found that "there may be a single, world-wide capital market, in which all investments are equally available to any given investor," Order, p. 16, and acknowledged much of the import of Modern Portfolio Theory and the Efficient Frontier. Order, p. 22, granting Plaintiffs' Requests Nos. 23-36. Nonetheless the Court found that "the mere existence of such a market does not lead to the conclusion that every financial instrument available in that market competes, at least in a constitutional sense, with every other financial investment instrument." Order, p. 16.

16. In reaching this conclusion, the Court ignores the uncontroverted evidence that all investments share the same nature and purpose of making an investor money, and the import of the uncontroverted evidence the Court itself acknowledges in its Order that all investments share the

common characteristics of risk, return, convenience and liquidity. The Court also overlooks direct evidence through witness testimony, including testimony of Professor Logue and the State's expert Marc Hebert, that competition occurs across asset classes and between investment products that are not in the same "subgroup." PTM, p. 16; Plaintiffs' Request Nos. 44, 52, 64, 90(a), 90(c)-(h), 97-98, 105, 109-110, 115-116, 120, 122-124, 132-134, 135(b)-(o). Finally, the Court misapprehends what it is Plaintiffs must (and did) prove. Plaintiffs are not required to show that every bank instrument paying interest or dividends is in competition with every other instrument paying interest or dividends, but only that there is some competition. PTM, p. 52; Bacchus, 468 U.S. at 271, 104 S.Ct. at 3055.

17. Accordingly, Plaintiffs request that the Court reconsider its reasoning and grant Plaintiffs' Request Nos. 37, 44, 51-52, 54, 59, 64, 66, 69-70, 82-84, 87-89, 90(a), 90(c)-(h), 97, 98, 104-106, 109-110, 114-116, 120, 122-125, 132-134, 135(b)-(o), 136, 147-148 and Requests D, F-J, L-P, R-T, and U (in its entirety for a finding that Plaintiffs are entitled to a full refund). To the extent it is necessary for the Court to reconsider the State's Requests and deny certain of the State's Requests in order to be consistent with granting the above Plaintiffs' Requests and ordering the Plaintiffs receive a full refund, Plaintiffs respectfully request that the Court do so.

18. Class Counsel for Plaintiffs has contacted counsel for the State, and the State does not consent to the relief sought herein. N.H. Super. Ct. R. 57-A.

19. Plaintiffs have cited legal authority herein, and no separate memorandum of law is believed to be necessary.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

A. Grant the within Motion for Reconsideration;

B. Upon reconsideration, modify its rulings on Plaintiffs' Requests for Findings of Fact and Rulings of Law to grant the Requests as set forth herein;

C. Upon reconsideration, modify its August 10, 2000 Order to find that Plaintiffs are entitled to a full refund of taxes paid on interest and dividends from 1991-1994; and

D. Grant such other relief as the Court deems just and appropriate under the circumstances.

Respectfully submitted,

ERNEST T. SMITH, III
SANDRA A. SMITH

MARGARET STRAW

ROBERT A. WELLS, EXECUTOR OF
THE ESTATE OF HELEN L. KENDALL

KURT M. SWENSON, TRUSTEE OF THE
SWENSON A. TRUST

UPTON, SANDERS & SMITH
PROFESSIONAL ASSOCIATION

Dated: August 21, 2000 By:/s/____________________
Russell F. Hilliard, Esq.
10 Center Street
Concord, NH 03302
(603) 224-7791

SHEEHAN PHINNEY BASS + GREEN,
PROFESSIONAL ASSOCIATION

Dated: August 21 2000 By:/s/____________________
Michael C. Harvell
James Q. Shirley
Elizabeth A. Bailey
1000 Elm Street
Manchester, NH 03101
(603)668-0300

McLANE, GRAF, RAULERSON &
MIDDLETON, PROFESSIONAL
ASSOCIATION

Dated: August 21, 2000 By:/s/____________________
Wilbur A. Glahn, III
Steven M. Burke
900 Elm Street,
PO Box 326
Manchester, NH 03105
(603) 625-6464

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Plaintiffs' Motion for Reconsideration has this day been mailed to Walter Maroney, Esquire, Senior Assistant Attorney General, Office of the Attorney General; Russell F. Hilliard, Esquire, Upton, Sanders & Smith, P.A., Wilbur A. Glahn, III, Esquire, McLane, Graf, Raulerson & Middleton, P.A., W. Wright Danenbarger, Esquire, Wiggin & Nourie, P.A.

Dated: August 21, 2000 /s/________________________
Michael C. Harvell

APPENDIX H

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

ERNEST T. SMITH, III, et al.

v.

N.H. DEPARTMENT OF REVENUE ADMINISTRATION, et al.

No. 95-E-509

ORDER

A class of similarly situated taxpayers has sued the New Hampshire Department of Revenue Administration ("DRA"), claiming that the New Hampshire interest and dividends tax ("the I&D tax"), in effect from 1923 until 1994, violated both the New Hampshire and the federal Constitutions. The Court (Manias, J.) transferred, without ruling, five constitutional questions to the New Hampshire Supreme Court, which ruled on two of them. See Smith v. New Hampshire Dept. of Rev. Admin., 141 N.H. 681 (1997). After a six-day hearing, on remand from the Supreme Court, this Court (McGuire, J.) issued an order dated August 10, 2000. Before the Court is the petitioners' Motion for Reconsideration. The DRA objects. For the reasons stated below, the petitioners' Motion for Reconsideration is **DENIED.**

"A motion for reconsideration allows a party to present 'points of law or fact that the Court has overlooked or misapprehended.'" Barrows v. Boles, 141 N.H. 382, 397 (1996) (quoting Super. Ct. R. 59-A(1)).

Upon careful review, the Court concludes that the petitioners have raised no points of law or fact that the Court has overlooked or misapprehended. Rather, they merely restate the same basic argument they have already made. For its part, the Court has not overlooked or misapprehended any of the law or the facts of this case; it has simply interpreted them differently from the way in which the petitioners interpret them. Accordingly, the petitioners' Motion for Reconsideration is **DENIED**.

So ordered.

Dated: 9/25/00 /s/

Kathleen A. McGuire,
Presiding Justice

APPENDIX I

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

95-E-059

ERNEST T. SMITH, III et al.

v.

N.H. DEPARTMENT OF REVENUE ADMINISTRATION et al.

STIPULATION REGARDING CERTIFICATION OF CLASS ACTION AND DISMISSAL OF CERTAIN CLAIMS

NOW COME the parties to this action and, through their counsel, stipulate and agree as follows:

1. The parties agree that, while in the ordinary instance, class actions dealing with tax refund suits are not appropriate for certification, the following class may be certified under Superior Court Rule 27-A, for the purposes of litigating the scope of the violation of the Commerce Clause of the United States Constitution pursuant to the Supreme Court's April 3, 1997, decision in this proceeding, 141 N.H. 681 (1997), and any remedies thereunder pursuant to paragraph 8, infra:

> All taxpayers who have paid an interest and dividend tax under NH RSA 77:1 et seq for any of the tax years 1991 through 1994 and who have timely filed their refund claims with the Department of Revenue Administration.

2. The parties will file a motion for certification of such Class within fifteen (15) days of the date of approval of this Stipulation by the Court.

3. Plaintiffs represent that: (i) they have paid Interest & Dividends tax for some or all of the years 1991 through 1994; (ii) they have timely filed refund claims for such years with the Department of Revenue Administration; (iii) as a group, in the aggregate, they paid taxes in the years in question on a variety of sources of income which they contend competed with interest and dividends from New Hampshire banks. The sources of income on which the Plaintiffs paid tax included a range from banks paying interest on deposits to non-financial-institution business organizations paying dividends on stock. As a result of the foregoing, Plaintiffs are representative of the Class and satisfy the typicality requirements of Rule 27-A.

4. The State shall give notice of the certification of the Class to all members of the Class, provided, however, that the pro rata cost of such notice or other out-of-pocket expenses of the Class incurred by the State in the first instance shall be deducted from any refund ultimately awarded to taxpayers in the Class by method approved by the Court.

5. Attached to the Motion for Class Certification will be a notice to members of the Class of the certification of the Class which contains a provision notifying each prospective member of the Class of their right to opt-out of the Class by executing a form mutually agreeable to the State and Class Counsel. Among other provisions, the form shall refer to the provisions of paragraph 6 of this Stipulation.

6. The Plaintiffs' claim that the municipal and state bond interest exemption is unconstitutional under the Commerce Clause of the United States Constitution is hereby dismissed with prejudice as to tax years 1991-94. This Dismissal with Prejudice is binding only as to taxpayers who remain members of the Class for refund claims for the years 1991 through 1994.

7. Whether types of income on which Plaintiff taxpayers were taxed competed with New Hampshire bank interest and dividends is the issue remanded by the New Hampshire Supreme Court (the "Remanded Issue"). The Court's findings on the Remanded Issue shall be binding on the State and on all members of the Class. The same remedy for the violation of the Commerce Clause shall be applied to each Plaintiff who has perfected his or her tax refund claim and who paid the tax on interest and dividends from sources of investment income that competed with interest and dividends from New Hampshire banks. The same remedy for the violation of the Commerce Clause will be applied to all other members of the Class who have perfected their tax refund claims and who paid the tax on interest and dividends from sources of investment income that competed with interest and dividends from New Hampshire banks.

8. If members of the Class have paid tax, on interest or dividends from sources that are clearly outside the class of investments with respect to which a determination has been made as to competition with New Hampshire bank interest and dividends, the parties agree to hold such additional evidentiary proceedings as may be necessary to determine the extent of competition for such investments with tax-preferred New Hampshire bank investments yielding interest and dividends.

9. One counsel from the counsel representing the taxpayers in this matter shall be designated lead counsel in the Class Action, to be determined by the taxpayers' counsel within thirty (30) days of the date on which this Stipulation is filed and approved by the Court.

10. This Stipulation shall take effect upon approval by the Court.

Respectfully submitted,

ERNEST T. SMITH, III and
SANDRA A. SMITH and
ROBERT P. BURROUGHS (DECEASED)

By and through their attorneys,

UPTON, SANDERS & SMITH,
PROFESSIONAL ASSOCIATION

Dated: November 25 , 1998

By: /s/________________________

Russell F. Hilliard
10 Center Street
Concord, NH 03302
(603)224-7791

HOWARD NICHOLS and
MARGERY NICHOLS and
MARGARET STRAW

By and through their attorneys,

SHEEHAN PHINNEY BASS + GREEN,
PROFESSIONAL ASSOCIATION

Dated: November 25 , 1998

By: /s/________________________

Michael C. Harvell
1000 Elm Street
Manchester, NH 03101
(603)668-0300

JOHN R. MCLANE, JR. And
ELISABETH D. MCLANE
TRUSTEES OF THE VIRGINIA S. DEANE
REVOCABLE TRUST OF 1985 -
THE EDUCATION TRUST and
ROBERT A. WELLS, EXECUTOR OF
THE ESTATE OF HELEN L. KENDALL
and ALEXANDER A. COURTNEY

By and through their attorneys,

MCLANE, GRAF, RAULERSON
& MIDDLETON,
PROFESSIONAL ASSOCIATION

Dated: November _25_, 1998

By: /s/________________________
Wilbur A. Glahn III
Steven M. Burke
900 Elm Street
Manchester, NH 03101
(603)625-6464

SWENSON A TRUST and
SWENSON MARITAL TRUST and
SWENSON FAMILY TRUST

By and through their attorneys,

WIGGIN & NOURIE,
PROFESSIONAL ASSOCIATION

Dated: November _25_, 1998

By: /s/________________________
W. Wright Danenbarger
20 Market Street
Manchester, NH 03101
(603)669-2211

NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION, et al.

By their attorneys

PHILIP T. McLAUGHLIN
ATTORNEY GENERAL

Dated: November _25_, 1998

By: /s/________________________
Martin P. Honigberg
Senior Assistant Attorneys General
Civil Bureau
33 Capitol Street
Concord, NH 03301-6308
(603)271-3658

Approved:

Dated: ______________ ______________________
Presiding Justice

APPENDIX J

THE STATE OF NEW HAMPSHIRE
Merrimack County Superior Court
163 N. Main Street
P. O. Box 2880
Concord, NH 03301 2880
603 225-5501

NOTICE OF DECISION

MICHAEL C HARVELL ESQ
SHEEHAN PHINNEY BASS & GREEN P A
PO BOX 3701
MANCHESTER NH 03105-3701

95-E-0059	**Ernest T Smith, III, et al v State of NH Dept. Revenue, et al**
95-E-0082	**Estate of Robert P. Burroughs v State of NH Dept. Revenue**
95-E-0063	**Robert A. Wells, Exec. Kendall Estate v NH Dept. Revenue, et al**
95-E-0092	**John R. McLane, Jr., et al v NH Dept. of Revenue Admin.,et al**
95-E-0091	**Kurt M. Swenson, et al v NH Dept. of Revenue Admn., et al**
95-E-0128	**Howard F. Nichols, et al v State of NH Dept. of Revenue, et al**
95-E-0129	**Alexander A. Courtney, et al v NH Dept. of Revenue, et al**
95-E-0136	**Margaret M. Straw v State of NH Dept. of Revenue Admin.eta**

Please be advised that on 12/03/98 Judge McGuire made the following order relative to:

Stipulation; Approved

STIPULATION RE: CERTIFICATION OF CLASS ACTION AND DISMISSAL OF CERTAIN CLAIMS.

"Approved. So Ordered."
Justice Kathleen A. McGuire, 12/3/98

12/11/98 William McGraw, Clerk of Court

cc: Russell F. Hilliard, Esq.
Christopher P. Reid, Esq.
Wilbur A. Glahn, III, Esq.
W. Wright Danenbarger, Esq.

APPENDIX K

TAXATION

77:4 What Taxable. Income of the following described classes is taxable:

I. Interest from bonds, notes, money at interest, and from all debts due the person to be taxed, except interest from notes or bonds of this state, deposits in any credit union, savings bank, building and loan association, or savings department of any loan and trust company or national bank in this state or in those of any state which exempts from taxation the principal or income of deposits in such institutions in this state owned by residents of that state and notes or bonds of any political subdivision of this state.

II. Dividends, other than stock dividends paid in new stock of the company issuing the same, on shares in all corporations and joint stock companies organized under the laws of any state, territory, or nation except New Hampshire state banks, trust companies, building and loan associations, credit unions, or national banks.

III. Dividends, other than stock dividends paid in new stock of the partnership, association, or trust issuing the same, on shares in partnerships, associations, or trusts the beneficial interest in which is represented by transferable shares.

IV. Dividends, other than that portion of a dividend declared by corporations to be a return of capital and considered by the federal internal revenue service to be such, the exemption of which is permitted by RSA 77:7.

HISTORY

Source. 1923, 65:2. PL 65:3, 1933, 184:1 RL 78:8 RSA 77:4. 1977, 240:1, 1983, 405:1. 1985, 164:1, eff. July 26, 1985.

Amendments - 1985. Paragraph I: Deleted "issued before May 4, 1983" following "Subdivision of this state" at the end of the paragraph.

- 1983. Paragraph I: Inserted "credit union" preceding "savings bank" and made other minor stylistic changes.

Paragraph II: Inserted "credit unions" preceding "or national".

- 1977. Paragraph IV: Added.

77:4 What Taxable. Income of the following described classes is taxable:

[No changes in paragraphs I-IV.]

V. For each holder of an ownership interest in a qualified investment company as defined in RSA 77-A:1, XXI, which holder is subject to tax under RSA 77, the holder's proportional share of the income, less any income attributable to United States government notes or bonds, of such qualified investment company shall be treated as a dividend; however, notwithstanding any other provision of RSA 77, no actual distribution made to such holder by such qualified investment company shall be taxable under RSA 77. [Added 1991, 67:8, eff. May 9, 1991.]

HISTORY

Source. 1923, 65:2. PL 65:3. 1933, 184:1. RL 78:8. RSA 77:4. 1977, 240:1. 1983, 405:1. 1985, 164:1. 1991, 67:8, eff. May 9, 1991.

Amendments - 1991. Paragraph V: Added.

APPENDIX L

SUPREME COURT DOCKET NO. ____
NOTICE OF APPEAL
(Rule 7)

Within thirty days from the date of the clerk's written notice of a decision on the merits, unless otherwise provided by law and except as otherwise provided by Rule 7 in criminal and probate appeals, the moving party shall file (a) 1 copy of the notice of appeal and of the attachments to it with each of the other parties, and with the attorney general in a criminal case; (b) either 2 or 3 copies with the clerk of the lower court depending upon whether a judge, or master and judge, decide the case; and (c) the original and 15 copies with the clerk of the supreme court. The moving party shall pay the filing fee simultaneously with the filing of the notice of appeal.

CASE TITLE (Full Name)

Ernest T. Smith, III, et al.
Plaintiffs,

v.

N.H. Department of Revenue Administration, ~~et al.~~ and Stanley R. Arnold, Commissioner of Revenue Administration
Defendant.

Which side is the moving party:
plaintiff, defendant or other?

Plaintiffs
If other, please specify:

____

____

If CRIMINAL case, please fill)
out the following:)
Is defendant In jail or prison? ___)
If so, where is the)
defendant incarcerated? _______)
What is the sentence? __________)
Was the trial counsel)
appointed? __________________)
Will the appellate defender be)
handling the appeal? __________)
____________________________________)

APPEAL FROM Merrimack County Superior Court
(Municipality or county and name of court)

Date of:
(a) clerk's notice: September 26, 2000

(b) sentencing (criminal): ____________________
(c) probate court filing: ______________________

Trial Judge; Master; Other:
Judge Kathleen McGuire
Court Reporter or Machine Operator:
Michelle McGirr, Court Reporter
Linda Beliveau, Court Monitor

Docket No. below: 95-E-059
95-E-082
95-E-063
95-E-092

95-E-091
95-E-128
95-E-129
95-E-136

Trial Counsel below:

For Plaintiff or State: The taxpayers were represented at trial by a Steering Committee of the following Attorneys who will continue to represent the Taxpayers before this Court:

Michael C. Harvell, Esq.
Sheehan, Phinney, Bass + Green, PA
1000 Elm Street, PO Box 3701
Manchester, NH 03105-3701

Wilbur A. Glahn, III, Esq.
McLane, Graf, Raulerson &
Middleton, PA
900 Elm Street, PO Box 326
Manchester, NH 03105

Russell F. Hilliard, Esq.
Upton, Sanders & Smith, PA
10 Centre Street
Concord, NH 03302

W. Wright Danenbarger, Esq.
Wiggin & Nourie, P.A.
20 Market Street
Manchester, Nit 03101

William F. Ardinger, Jr., Esq.
Rath, Young & Pignatelli, P.A.
One Capital Plaza, Box 1500
Concord, NH 03302

David E. Barradale, Esq.
Amell Professional Association
40 South River Road, Unit 32
Bedford, NH 03110

For Defendant:
Walter L. Maroney, Esq.
Senior Assistant Attorney General
Office of the Attorney General
33 Capitol Street
Concord, NH 03301

If party is a corporation or association, give the names and address of parent, subsidiaries, and affiliates (to extent known): Not applicable.

MOVING PARTY'S COUNSEL IN SUPREME COURT:

Name/Address/Telephone
Michael C. Harvell, Esq.
Sheehan Phinney Bass + Green, P.A.
1000 Elm Street, P.O. Box 3701
Manchester, NH 03105-3701
(603) 668-0300

Wilbur A. Glahn, III, Esq.
McLane, Graf, Raulerson &
Middleton, P.A.
900 Elm Street, PO Box 326
Manchester, NH 03105
(603) 625-6464

Russell F. Hilliard, Esq.
Upton, Sanders & Smith, P.A.
10 Centre Street
Concord, NH 03302
(603) 224-7791

W. Wright Danenbarger, Esq.
Wiggin & Nourie, P.A.
20 Market Street
Manchester, NH 03101
(603) 669-2211

William F. Ardinger, Jr., Esq.
Path, Young & Pignatelli, P.A.
One Capital Plaza, Box 1500
Concord, NH 03302
(603) 226-2600

David E. Barradale, Esq.
Ansell Professional Association.
40 South River Road, Unit 32
Bedford, NH 03110
(603) 664-8211

OPPOSING PARTY'S COUNSEL IN SUPREME COURT:

Walter L. Maroney, Esq.
Senior Assistant Attorney General
Office of the Attorney General
33 Capitol Street
Concord, NH 03301

Number of days of trial: 6

Dates of hearing and/or trial: May 22-25 and 30-31, 2000.

Does the moving party waive oral argument? No.

List the exhibits necessary to determine the questions raised on appeal:

1. Form DP-10 1991 Interest and Dividends Returns and Instructions (Plaintiffs' Exh. 9A)
2. Form DP-10 1992 Interest and Dividends Returns and Instructions (Plaintiffs' Exh. 9B)
3. Form DP-10 1993 Interest and Dividends Returns and Instructions (Plaintiffs' Exh. 9C)
4. Form DP-10 1994 Interest and Dividends Returns and Instructions (Plaintiffs' Exh. 9D)
5. Expert Report of Dennis E. Logue, Ph.D., dated 3/16/98 (Plaintiffs' Exh. 10)

6. Excerpts from the 1992 NH Retirement System Comprehensive Annual Financial Report (Plaintiffs' Exh. 13)

7. Excerpts from the 1993 NH Retirement System Comprehensive Annual Financial Report. (Plaintiffs' Exh. 14)

8. 1999 NH Retirement System Comprehensive Annual Financial Report (Plaintiffs' Exh,. 15)

9. Notice of Withdrawal of Defendants' Commerce Clause Argument in the case of Brown v. Dept. of Revenue Administration, et al. (Plaintiffs' Exh. 23)

10. Defendant's Statement of the Issues in Dispute in the case of Brown v. Dept. of Revenue Administration, et al. (Plaintiffs' Exh. 24)

11. Defendant's Statement of the Issues in Dispute in the case of Smith v. N.H. Dep't. of Revenue Admin.

12. U.S. Dept. of Justice and FTC Horizontal Merger Guidelines (Def's Exh. 52)

13. Expert Report of Margaret Guerin-Calvert

14. Plaintiffs' I & D tax returns and back up materials (Exh. 1-8)

15. Harold Sullivan's testimony before the NH Legislature (Exh. 22)

BRIEF DESCRIPTION OF NATURE OF CASE AND RESULT:

This matter is a class action consisting of all of the taxpayers who paid an interest and dividends tax from 1991 to 1994, and properly perfected their refund claims for such tax with the Department of Revenue Administration. On remand from Smith v. N.H. Dep't. of Revenue Admin., 141 N.H. 681 (1997) the Superior Court (McGuire, J.) held that only the taxpayers who paid an interest and dividends tax on out-of-state bank interest and bank stock dividends were entitled to a cash refund.

STATUTE, ORDINANCE, REGULATION, RULE, OR OTHER LEGAL AUTHORITY UPON WHICH THE CLAIM OF CIVIL OR CRIMINAL LIABILITY WAS BASED:

Commerce Clause of the United States Constitution; N.H. R.S.A. 77.

SPECIFIC QUESTIONS TO BE RAISED ON APPEAL. EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. SEE RULE 7(7). STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH. SEE RULE 16(3)(b).

1. Whether the Superior Court failed to follow this Court's remand order in Smith when it held that the illegal exemptions from interest and dividends tax for investments issued by New Hampshire banks facially discriminated against only investments issued by interstate banks and no other similar investments issued by non-banks?

2. Whether the Superior Court failed to follow this Court's remand order when it failed to determine the scope or extent of discrimination by the interest and dividends tax exemptions against interstate commerce?

3. Whether the Superior Court failed to follow this Court's remand order and applicable United States Supreme Court precedent when it determined that, as a matter of law, plaintiffs must prove more than "some" competition and by requiring plaintiffs to prove that the challenged exemptions had an "actual effect" on the investment decisions of New Hampshire residents and that investments issued by New Hampshire banks were "economic counterparts" of other interstate investments?

4. Whether facial discrimination between interest and dividend bearing investments issued by New Hampshire banks and similar investments issued by interstate non-bank enterprises requires invalidation of the entire New Hampshire Interest and Dividends tax paid in 1991 to 1994?

5. Based on evidence presented at trial that interest bearing investments and common stock issued by New Hampshire banks competed with interest bearing instruments and common stock, issued by interstate non-bank enterprises, including the testimony of Plaintiffs' and Defendant's expert witnesses and numerous fact witnesses, whether the trial court erred in concluding that interest bearing investments and common stock issued by New Hampshire banks did not compete with interest bearing investments and common stock issued by interstate non-bank enterprises?

WITH REFERENCE TO EACH SPECIFIC QUESTION RAISED ON APPEAL, IDENTIFYING THE QUESTION BY ITS NUMBER, SPECIFY:

(A) The proper standard of review to be applied by the court to the question, citing relevant authority;

(B) The parts of the proceeding you would designate the court reporter to transcribe, or whether an adequate written substitute could be provided in place of a transcript; and

(C) The case(s) most relied upon to support the moving party's position:

Question 1:

(A) The standard of review for questions of law is de novo. New England Tel. & Tel. Co. v. City of Rochester, 740 A.2d 135 (1999); Estate of Croteau v. Croteau, 143 NH 177 (1998).

(B) The Plaintiffs have ordered the entire transcript to be transcribed. The Plaintiffs also direct this Court's attention to this Court's remand order in Smith v. N.H. Dep't. of Revenue Admin., 141 N.H. 681 (1997) and the trial court's August 10, 2000 Order on the merits.

(C) Smith v. N.H. Dep't. of Revenue Admin., 141 N.H. 681 (1997).

Question 2:

(A) The standard of review for questions of law is de novo. New England Tel. & Tel. Co. v. City of Rochester, 740 A.2d 135 (1999); Estate of Croteau v. Croteau, 143 NH 177 (1998).

(B) The Plaintiffs have ordered the entire transcript to be transcribed, The Plaintiffs also direct this Court's attention to this Court's remand order in Smith v. N.H. Dep't. of Revenue Admin., 141 N.H. 681 (1997) and the trial court's August 10, 2000 Order on the merits.

(C) Fulton Corp. v: Faulkner, 516 U.S. 325, 116 S.Ct. 848 (1997); Boston Stock Exchange v. State Tax Comm'n., 429 U.S. 318, 97 S.Ct. 599 (1977); Smith v. N.H. Dep't. of Revenue Admin., 141N.H. 681 (1997)

Question 3:

(A) The standard of review for questions of law is de novo. New England Tel. & Tel. Co. v. City of Rochester, 740 A.2d 135 (1999); Estate of Croteau v. Croteau, 143 NH 177 (1998).

(B) The Plaintiffs have ordered the entire transcript to be transcribed. The Plaintiffs also direct this Court's attention to this Court's remand order in Smith v. N.H. Dep't. of Revenue Admin., 141 N.H. 681 (1997) and the trial court's August 10, 2000 Order on the merits.

(C) Fulton Corp. v. Faulkner, 516 U.S. 325, 116 S.Ct. 848 (1997); Boston Stock Exchange v. State Tax Comm'n., 429 U.S. 318, 97 S.Ct. 599 (1977); Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine, 520

U.S. 564, 117 S.Ct. 1590 (1997); Associate Industries of Mo. v. Lohman, 511 U.S. 641, 114 S.Ct. 1815 (1994); Bacchus Imports v. Dias, 468 U.S. 263, 104 S.Ct. 3049 (1984); Maryland v. Louisiana, 451 U.S. 725,101 S.Ct. 2114 (1981); Smith v. N.H. Dep't. of Revenue Admin., 141 N.H. 681 (1997).

Question 4:

(A) The standard of review for questions of law is de novo. New England Tel. & Tel. Co. v. City of Rochester, 740 A.2d 135 (1999); Estate of Crotoau v. Crotcau, 143 NH 177 (1998).

(B) The Plaintiffs have ordered the entire transcript to be transcribed.

(C) Fulton Corp. v. Faulkner, 516 U.S. 325, 116 S.Ct. 848 (1997); Bacchus Imports v. Dias, 468 U.S. 263, 104 S.Ct. 3049 (1984); Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 97 S.Ct. 599 (1977).

Question 5:

(A) The standard of review is abuse of discretion. Arsenault v. Scanlon, 139 NH 592 (1995); Kerouac v. Town of Hollis, 139 NH 554 (1995).

(B) The Plaintiffs have ordered the entire transcript to be transcribed. In particular, the Plaintiffs direct this Court's attention to the portions of the transcript containing the testimony of Professor Dennis Logue, and Messrs. Marc Hebert, William Morrison, David Ruedig, Harold Sullivan, James Seppala, Paul Campagna, and Richard Gagne.

(C) Fulton Corp. v. Faulkner, 516 U.S. 325, 116 S.Ct. 848 (1997); Boston Stock Exchange v. State Tax Comm'n., 429 U.S. 318, 97 S.Ct. 599 (1977); Bacchus Imports v. Dias, 468 U.S. 263, 104 S.Ct. 3049 (1984); Smith v. N.H. Dep't. of Revenue Admin., 141 N.H. 6gt (1997).

If the most extensive transcript designated above were ordered by the court, what is the court reporter's estimate (obtain directly from the trial court clerk) of the number of pages and the cost thereof:

Pages: 1,404 **Cost:** $5,265.00

A DIRECT AND CONCISE STATEMENT OF THE REASONS WHY A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON THE QUESTIONS AND WHY THE ACCEPTANCE OF THE APPEAL WOULD PROTECT A PARTY FROM SUBSTANTIAL AND IRREPARABLE INJURY, OR PRESENT THE OPPORTUNITY TO DECIDE, MODIFY, OR CLARIFY AN ISSUE OF GENERAL IMPORTANCE IN THE ADMINISTRATION OF JUSTICE:

First, the Court should accept the appeal of this case from the Superior Court because the Superior Court failed to comply with the remand instructions in Smith v. N.H. Dep't. of Revenue Admin., 141 N.H. 681 (1997). That decision remanded this matter to the Superior Court to determine the scope of discrimination of the Interest and Dividends tax against interstate commerce. Id. at 696. In response, the Superior Court held that it need not determine the scope of discrimination and that the Supreme Court had found that the facial discrimination against interstate commerce applied only to investments issued by interstate banks.

This Court should also accept the appeal of this matter because the Superior Court's analysis is substantially at odds with United States Supreme Court precedent such as Bacchus Imports v. Dias, 468 U.S. 268, 104 S.Ct 3049 (1984) and Fulton Corp. v. Faulkner, 516 U.S. 325, 116 S.Ct. 848 (1997). While the Bacchus and Fulton cases make it clear that the amount of impact on interstate commerce is irrelevant if there is any discriminatory purpose or effect, the Superior Court held below that taxpayers must prove an "actual effect" on the investment decisions of New Hampshire residents or "demonstrable harm" to investors and also that plaintiffs were required to prove that investments issued by New Hampshire banks were "economic counterparts" of other interstate investments in order to prove discrimination, a holding which appellants submit is squarely inconsistent with Bacchus and Fulton.

Lastly, this Court should accept this appeal because the case presents the question whether Smith v. N.H. Dep't of Revenue Admin., 141 N.H. 681 (1997) was correctly decided. Fulton Corp. v. Faulkner, 516 U.S. 325, 116 S.Ct. 848 (1997), taken together with General Motors Corporation v. Tracy, 519 U.S. 278, 117 S.Ct. 811 (1997) do not require a reviewing court to conduct an economic or factual analysis in order to conclude that a tax preference in favor of domestic enterprises illegally discriminates against interstate commerce. This case therefore represents an opportunity for this Court to clarify its holding in Smith in light of the Tracy and Fulton cases.

If the taxpayers prevail in their claims of error, counsel represents to the best of its knowledge that the tax refund claims of the class would amount to approximately $130 million.

TITLE OF CASES WITH SIMILAR OR IDENTICAL ISSUES PENDING, OR EXPECTED TO BE ENTERED, IN THE SUPREME COURT (TO EXTENT KNOWN): Not applicable.

ATTACH TO THIS FORM THE DECISION BELOW, THE CLERK'S WRITTEN NOTICE OF THE DECISION BELOW, ANY ORDER DISPOSING OF A TIMELY-FILED POST-TRIAL MOTION, THE CLERK'S WRITTEN NOTICE OF ANY ORDER DISPOSING OF A TIMELY-FILED POST-TRIAL MOTION, AND SUCH OTHER PLEADINGS AND DOCUMENTS AS THE COURT NEEDS TO EVALUATE THE SPECIFIC QUESTIONS RAISED ON APPEAL AND TO DETERMINE WHETHER THE APPEAL IS TIMELY FILED. LEGAL MEMORANDA, INCLUDING LEGAL MEMORANDA FILED WITH THE TRIAL COURT, SHALL NOT BE SUBMITTED WITHOUT THE PRIOR APPROVAL OF THE CLERK. INCLUDE A TABLE OF CONTENTS LISTING EACH ATTACHMENT AND REFERRING TO SEQUENTIALLY NUMBERED PAGES. IF THE PARTIES' REQUESTS FOR FINDINGS AND RULINGS ARE ATTACHED, NOTE ON THE RIGHT SIDE OF PAGE WHETHER EACH REQUEST WAS GRANTED, DENIED, OR NOT RULED UPON [RULE 6(5)]. REGARDING THE TEST OR RELEVANT CONSTITUTIONAL, STATUTORY, AND OTHER DOCUMENTS, SEE RULE 7(6).

CERTIFICATIONS

1. **I hereby certify that every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection, or where appropriate, by a properly filed pleading.**

/s/ ____________________

Michael C. Harvell, Esq.
Sheehan Phinney Bass + Green, P.A.
1000 Elm Street, P.O. Box 3701
Manchester, NH 03105-3701
(603) 668-0300

2. **I hereby certify that copies of this notice of appeal have been served on all parties to the case and have been filed with the clerk of the court from which appeal is taken in accordance with Rule 26(2).**

/s/ ____________________

Michael C. Harvell, Esq.
Sheehan Phinney Bass + Green, P.A.
1000 Elm Street, P.O. Box 3701
Manchester, NH 03105-3701
(603) 66-0300

APPENDIX M

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

2001 TERM

DECEMBER SESSION

NO. 2000-682

ERNEST T. SMITH, III, ET AL

PLAINTIFFS

v.

N.H. DEPARTMENT OF REVENUE
ADMINISTRATION, ET AL

DEFENDANTS

AMENDED NOTICE OF APPEAL

Attorneys for Plaintiffs

Michael C. Harvell, Esq.
Sheehan Phinney Bass + Green, P.A.
1000 Elm Street, P.O. Box 3701
Manchester, NH 03105-3701
(603) 668-0300

Wilbur A. Glahn, III, Esq.
McLane, Graf, Raulerson &
Middleton, P.A.
900 Elm Street, PO Box 326
Manchester, NH 03105
(603) 625-6464

Russell F. Hilliard, Esq.
Upton, Sanders & Smith, P.A.
10 Centre Street
Concord, NH 03302
(603) 224-7791

W. Wright Danenbarger, Esq.
Wiggin & Nourie, P.A.
20 Market Street
Manchester, NH 03101
(603) 669-2211

William F. Ardinger, Jr., Esq.
Path, Young & Pignatelli, P.A.
One Capital Plaza, Box 1500
Concord, NH 03302
(603) 226-2600

David E. Barradale, Esq.
Ansell Professional Association.
40 South River Road, Unit 32
Bedford, NH 03110
(603) 664-8211

SUPREME COURT DOCKET NO. ____
NOTICE OF APPEAL
(Rule 7)

Within thirty days from the date of the clerk's written notice of a decision on the merits, unless otherwise provided by law and except as otherwise provided by Rule 7 in criminal and probate appeals, the moving party shall file (a) 1 copy of the notice of appeal and of the attachments to it with each of the other parties, and with the attorney general in a criminal case; (b) either 2 or 3 copies with the clerk of the lower court depending upon whether a judge, or master and judge, decide the case; and (c) the original and 15 copies with the clerk of the supreme court. The moving party shall pay the filing fee simultaneously with the filing of the notice of appeal.

CASE TITLE (Full Name)

Ernest T. Smith, III, et al.
Plaintiffs,

v.

N.H. Department of Revenue Administration, and
Stanley R. Arnold, Commissioner
of Revenue Administration
Defendant.

Which side is the moving party:
plaintiff, defendant or other?
Plaintiffs
If other, please specify:

____

If CRIMINAL case, please fill)
out the following:)
Is defendant In jail or prison? ___)
If so, where is the)
defendant incarcerated? ________)
What is the sentence? __________)
Was the trial counsel)
appointed? ______________)
Will the appellate defender be)
handling the appeal? __________)
)

APPEAL FROM Merrimack County Superior Court
(Municipality or county and name of court)

Date of:
(a) clerk's notice: September 26, 2000

(b) sentencing (criminal): ______________
(c) probate court filing: ________________

Trial Judge; Master; Other:
Judge Kathleen McGuire
Court Reporter or Machine Operator:
Michelle McGirr, Court Reporter
Linda Beliveau, Court Monitor

Docket No. below: 95-E-059
95-E-063
95-E-082
95-E-091
95-E-092
95-E-128
95-E-129
95-E-136

Trial Counsel below:

For Plaintiff or State: The taxpayers were represented at trial by a Steering Committee of the following Attorneys who will continue to represent the Taxpayers before this Court:

Michael C. Harvell, Esq.
Sheehan, Phinney, Bass + Green, PA
1000 Elm Street, PO Box 3701
Manchester, NH 03105-3701

Wilbur A. Glahn, III, Esq.
McLane, Graf, Raulerson &
Middleton, PA
900 Elm Street, PO Box 326
Manchester, NH 03105

Russell F. Hilliard, Esq.
Upton, Sanders & Smith, PA
10 Centre Street
Concord, NH 03302

W. Wright Danenbarger, Esq.
Wiggin & Nourie, P.A.
20 Market Street
Manchester, NH 03101

William F. Ardinger, Jr., Esq.
Rath, Young & Pignatelli, P.A.
One Capital Plaza, Box 1500
Concord, NH 03302

David E. Barradale, Esq.
Amell Professional Association
40 South River Road, Unit 32
Bedford, NH 03110

For Defendant:
Craig Donais, Esq.
Senior Assistant Attorney General
Office of the Attorney General
33 Capitol Street
Concord, NH 03301

If party is a corporation or association, give the names and address of parent, subsidiaries, and affiliates (to extent known): Not applicable.

MOVING PARTY'S COUNSEL IN SUPREME COURT:

Name/Address/Telephone
Michael C. Harvell, Esq.
Sheehan Phinney Bass + Green, P.A.
1000 Elm Street, P.O. Box 3701
Manchester, NH 03105-3701
(603) 668-0300

Wilbur A. Glahn, III, Esq.
McLane, Graf, Raulerson &
Middleton, P.A.
900 Elm Street, PO Box 326
Manchester, NH 03105
(603) 625-6464

Russell F. Hilliard, Esq.
Upton, Sanders & Smith, P.A.
10 Centre Street
Concord, NH 03302
(603) 224-7791

W. Wright Danenbarger, Esq.
Wiggin & Nourie, P.A.
20 Market Street
Manchester, NH 03101
(603) 669-2211

William F. Ardinger, Jr., Esq.
Path, Young & Pignatelli, P.A.
One Capital Plaza, Box 1500
Concord, NH 03302
(603) 226-2600

David E. Barradale, Esq.
Ansell Professional Association.
40 South River Road, Unit 32
Bedford, NH 03110
(603) 664-8211

OPPOSING PARTY'S COUNSEL IN SUPREME COURT:

Craig Donais, Esq.
Senior Assistant Attorney General
Office of the Attorney General
33 Capitol Street
Concord, NH 03301

Number of days of trial: 6

Dates of hearing and/or trial: May 22-25 and 30-31, 2000.

Does the moving party waive oral argument? No.

List the exhibits necessary to determine the questions raised on appeal:

1. Form DP-10 1991 Interest and Dividends Returns and Instructions (Plaintiffs' Exh. 9A)

2. Form DP-10 1992 Interest and Dividends Returns and Instructions (Plaintiffs' Exh. 9B)

3. Form DP-10 1993 Interest and Dividends Returns and Instructions (Plaintiffs' Exh. 9C)

4. Form DP-10 1994 Interest and Dividends Returns and Instructions (Plaintiffs' Exh. 9D)

5. Expert Report of Dennis E. Logue, Ph.D., dated 3/16/98 (Plaintiffs' Exh. 10)

6. Excerpts from the 1992 NH Retirement System Comprehensive Annual Financial Report (Plaintiffs' Exh. 13)

7. Excerpts from the 1993 NH Retirement System Comprehensive Annual Financial Report. (Plaintiffs' Exh. 14)

8. 1999 NH Retirement System Comprehensive Annual Financial Report (Plaintiffs' Exh,. 15)

9. Notice of Withdrawal of Defendants' Commerce Clause Argument in the case of

Brown v. Dept. of Revenue Administration, et al. (Plaintiffs' Exh. 23)

10. Defendant's Statement of the Issues in Dispute in the case of Brown v. Dept. of Revenue Administration, et al. (Plaintiffs' Exh. 24)

11. Defendant's Statement of the Issues in Dispute in the case of Smith v. N.H. Dep't. of Revenue Admin.

12. U.S. Dept. of Justice and FTC Horizontal Merger Guidelines (Def's Exh. 52)

13. Expert Report of Margaret Guerin-Calvert

14. Plaintiffs' I & D tax returns and back up materials (Exh. 1-8)

15. Harold Sullivan's testimony before the NH Legislature (Exh. 22)

BRIEF DESCRIPTION OF NATURE OF CASE AND RESULT:

This matter is a class action consisting of all of the taxpayers who paid an interest and dividends tax from 1991 to 1994, and properly perfected their refund claims for such tax with the Department of Revenue Administration. On remand from Smith v. N.H. Dep't. of Revenue Admin., 141 N.H. 681 (1997) the Superior Court (McGuire, J.) held that only the taxpayers who paid an interest and dividends tax on out-of-state bank interest and bank stock dividends were entitled to a cash refund.

STATUTE, ORDINANCE, REGULATION, RULE, OR OTHER LEGAL AUTHORITY UPON WHICH THE CLAIM OF CIVIL OR CRIMINAL LIABILITY WAS BASED:

Commerce Clause of the United States Constitution; N.H. R.S.A. 77.

SPECIFIC QUESTIONS TO BE RAISED ON APPEAL. EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. SEE RULE 7(7). STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH. SEE RULE 16(3)(b).

1. Whether the Superior Court failed to follow this Court's remand order in Smith when it held that the illegal exemptions from interest and dividends tax for investments issued by New Hampshire banks facially discriminated against only investments issued by interstate banks and no other similar investments issued by non-banks?

2. Whether the Superior Court failed to follow this Court's remand order when it failed to determine the scope or extent of discrimination by the interest and dividends tax exemptions against interstate commerce?

3. Whether the Superior Court failed to follow this Court's remand order and applicable United States Supreme Court precedent when. it determined that, as a matter of law, plaintiffs must prove more than "some" competition and by requiring plaintiffs to prove that the challenged exemptions had an "actual effect" on the investment decisions of New Hampshire residents and that investments issued by New Hampshire banks were "economic counterparts" of other interstate investments?

4. Whether facial discrimination between interest and dividend bearing investments issued by New Hampshire banks and similar investments issued by interstate non-bank enterprises requires invalidation of the entire New Hampshire Interest and Dividends tax paid in 1991 to 1994?

5. Based on evidence presented at trial that interest bearing investments and common stock issued by New Hampshire banks competed with interest bearing instruments and common stock, issued by interstate non-bank enterprises, including the testimony of Plaintiffs' and Defendant's expert witnesses and numerous fact witnesses, whether the trial court erred in concluding that interest bearing investments and common stock issued by New Hampshire banks did not compete with interest bearing investments and common stock issued by interstate non-bank enterprises?

WITH REFERENCE TO EACH SPECIFIC QUESTION RAISED ON APPEAL, IDENTIFYING THE QUESTION BY ITS NUMBER, SPECIFY:

(A) **The proper standard of review to be applied by the court to the question, citing relevant authority;**

(B) **The parts of the proceeding you would designate the court reporter to transcribe, or whether an adequate written substitute could be provided in place of a transcript; and**

(C) **The case(s) most relied upon to support the moving party's position:**

Question 1:

(A) The standard of review for questions of law is de novo. New England Tel. & Tel. Co. v. City of Rochester, 740 A.2d 135 (1999); Estate of Croteau v. Croteau, 143 NH 177 (1998). Further, there is a de novo standard of review for the trial court's conclusions concerning the federal commerce clause. See National Solid Wastes Management Association v. Meyer, 63 F.3d 652 (7th Cir. 1995). The standard of review is de novo for the trial court's rulings on mixed questions of law and fact that implicate constitutional rights. See National Collegiate Athletic Association v. Miller, 10 F.3d 633 (9th Cir. 1993).

(B) The Plaintiffs have ordered the entire transcript to be transcribed. The Plaintiffs also direct this Court's attention to this Court's remand order in Smith v. N.H. Dep't. of Revenue Admin., 141 N.H. 681 (1997) and the trial court's August 10, 2000 Order on the merits.

(C) Smith v. N.H. Dep't. of Revenue Admin., 141 N.H. 681 (1997).

Question 2:

(A) The standard of review for questions of law is de novo. New England Tel. & Tel. Co. v. City of Rochester, 740 A.2d 135 (1999); Estate of Croteau v. Croteau, 143 NH 177 (1998). Further, there is a de novo standard of review for the trial court's conclusions concerning the federal commerce clause. See National Solid Wastes Management Association v. Meyer, 63 F.3d 652 (7th Cir. 1995). The standard of review is de novo for the trial court's rulings on mixed questions of law and fact that implicate constitutional rights.

See National Collegiate Athletic Association v. Miller, 10 F.3d 633 (9th Cir. 1993).

(B) The Plaintiffs have ordered the entire transcript to be transcribed, The Plaintiffs also direct this Court's attention to this Court's remand order in Smith v. N.H. Dep't. of Revenue Admin., 141 N.H. 681 (1997) and the trial court's August 10, 2000 Order on the merits.

(C) Fulton Corp. v: Faulkner, 516 U.S. 325, 116 S.Ct. 848 (1997); Boston Stock Exchange v. State Tax Comm'n., 429 U.S. 318, 97 S.Ct. 599 (1977); Smith v. N.H. Dep't. of Revenue Admin., 141N.H. 681 (1997)

Question 3:

(A) The standard of review for questions of law is de novo. New England Tel. & Tel. Co. v. City of Rochester, 740 A.2d 135 (1999); Estate of Croteau v. Croteau, 143 NH 177 (1998). Further, there is a de novo standard of review for the trial court's conclusions concerning the federal commerce clause. See National Solid Wastes Management Association v. Meyer, 63 F.3d 652 (7th Cir. 1995). The standard of review is de novo for the trial court's rulings on mixed questions of law and fact that implicate constitutional rights. See National Collegiate Athletic Association v. Miller, 10 F.3d 633 (9th Cir. 1993).

(B) The Plaintiffs have ordered the entire transcript to be transcribed. The Plaintiffs also direct this Court's attention to this Court's remand order in Smith v. N.H. Dep't. of Revenue Admin., 141 N.H. 681 (1997) and the trial court's August 10, 2000 Order on the merits.

(C) Fulton Corp. v. Faulkner, 516 U.S. 325, 116 S.Ct. 848 (1997); Boston Stock Exchange v. State Tax Comm'n., 429 U.S. 318, 97 S.Ct. 599 (1977); Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine, 520 U.S. 564, 117 S.Ct. 1590 (1997); Associate Industries of Mo. v. Lohman, 511 U.S. 641, 114 S.Ct. 1815 (1994); Bacchus Imports v. Dias, 468 U.S. 263, 104 S.Ct. 3049 (1984); Maryland v. Louisiana, 451 U.S. 725,101 S.Ct. 2114 (1981); Smith v. N.H. Dep't. of Revenue Admin., 141 N.H. 681 (1997).

Question 4:

(A) The standard of review for questions of law is de novo. New England Tel. & Tel. Co. v. City of Rochester, 740 A.2d 135 (1999); Estate of Crotoau v. Crotcau, 143 NH 177 (1998). Further, there is a de novo standard of review for the trial court's conclusions concerning the federal commerce clause. See National Solid Wastes Management Association v. Meyer, 63 F.3d 652 (7th Cir. 1995). The standard of review is de novo for the trial court's rulings on mixed questions of law and fact that implicate constitutional rights. See National Collegiate Athletic Association v. Miller, 10 F.3d 633 (9th Cir. 1993).

(B) The Plaintiffs have ordered the entire transcript to be transcribed.

(C) Fulton Corp. v. Faulkner, 516 U.S. 325, 116 S.Ct. 848 (1997); Bacchus Imports v. Dias, 468 U.S. 263, 104 S.Ct. 3049 (1984); Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 97 S.Ct. 599 (1977).

Question 5:

(A) There is a de novo standard of review for the trial court's conclusions concerning the federal commerce clause. See National Solid Wastes Management Association v. Meyer, 63 F.3d 652 (7th Cir. 1995). The standard of review is de novo for the trial court's rulings on mixed questions of law and fact that implicate constitutional rights. See National Collegiate Athletic Association v. Miller, 10 F.3d 633 (9th Cir. 1993).

(B) The Plaintiffs have ordered the entire transcript to be transcribed. In particular, the Plaintiffs direct this Court's attention to the portions of the transcript containing the testimony of Professor Dennis Logue, and Messrs. Marc Hebert, William Morrison, David Ruedig, Harold Sullivan, James Seppala, Paul Campagna, and Richard Gagne.

(C) Fulton Corp. v. Faulkner, 516 U.S. 325, 116 S.Ct. 848 (1997); Boston Stock Exchange v. State Tax Comm'n., 429 U.S. 318, 97 S.Ct. 599 (1977); Bacchus Imports v. Dias, 468 U.S. 263, 104 S.Ct. 3049 (1984); Smith v. N.H. Dep't. of Revenue Admin., 141 N.H. 6gt (1997).

If the most extensive transcript designated above were ordered by the court, what is the court reporter's estimate (obtain directly from the trial court clerk) of the number of pages and the cost thereof:

Pages: 1,404 **Cost:** $5,265.00

A DIRECT AND CONCISE STATEMENT OF THE REASONS WHY A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON THE QUESTIONS AND WHY THE ACCEPTANCE OF THE APPEAL WOULD PROTECT A PARTY FROM SUBSTANTIAL AND IRREPARABLE INJURY, OR PRESENT THE OPPORTUNITY TO DECIDE, MODIFY, OR CLARIFY AN ISSUE OF GENERAL IMPORTANCE IN THE ADMINISTRATION OF JUSTICE:

First, the Court should accept the appeal of this case from the Superior Court because the Superior Court failed to comply with the remand instructions in Smith v. N.H. Dep't. of Revenue Admin., 141 N.H. 681 (1997). That decision remanded this matter to the Superior Court to determine the scope of discrimination of the Interest and Dividends tax against interstate commerce. Id. at 696. In response, the Superior Court held that it need not determine the scope of discrimination and that the Supreme Court had found that the facial discrimination against interstate commerce applied only to investments issued by interstate banks.

This Court should also accept the appeal of this matter because the Superior Court's analysis is substantially at odds with United States Supreme Court precedent such as Bacchus Imports v. Dias, 468 U.S. 268, 104 S.Ct 3049 (1984) and Fulton Corp. v. Faulkner, 516 U.S. 325, 116 S.Ct. 848 (1997). While the Bacchus and Fulton cases make it clear that the amount of impact on interstate commerce is irrelevant if there is any discriminatory purpose or effect, the Superior Court held below that taxpayers must prove an "actual effect" on the investment decisions of New Hampshire residents or "demonstrable harm" to investors and also that plaintiffs were required to prove that investments issued by New Hampshire banks were "economic counterparts" of other interstate investments in order to prove discrimination, a holding which appellants submit is squarely inconsistent with Bacchus and Fulton.

Lastly, this Court should accept this appeal because the case presents the question whether Smith v. N.H. Dep't of Revenue Admin., 141 N.H. 681 (1997) was correctly decided. Fulton Corp. v. Faulkner, 516 U.S. 325, 116 S.Ct. 848 (1997), taken together with General Motors Corporation v. Tracy, 519 U.S. 278, 117 S.Ct. 811 (1997) do not require a reviewing court to conduct an economic or factual analysis in order to conclude that a tax preference in favor of domestic enterprises illegally discriminates against interstate commerce. This case therefore represents an opportunity for this Court to clarify its holding in Smith in light of the Tracy and Fulton cases.

If the taxpayers prevail in their claims of error, counsel represents to the best of its knowledge that the tax refund claims of the class would amount to approximately $130 million.

TITLE OF CASES WITH SIMILAR OR IDENTICAL ISSUES PENDING, OR EXPECTED TO BE ENTERED, IN THE SUPREME COURT (TO EXTENT KNOWN): Not applicable.

ATTACH TO THIS FORM THE DECISION BELOW, THE CLERK'S WRITTEN NOTICE OF THE DECISION BELOW, ANY ORDER DISPOSING OF A TIMELY-FILED POST-TRIAL MOTION, THE CLERK'S WRITTEN NOTICE OF ANY ORDER DISPOSING OF A TIMELY-FILED POST-TRIAL MOTION, AND SUCH OTHER PLEADINGS AND DOCUMENTS AS THE COURT NEEDS TO EVALUATE THE SPECIFIC QUESTIONS RAISED ON APPEAL AND TO DETERMINE WHETHER THE APPEAL IS TIMELY FILED. LEGAL MEMORANDA, INCLUDING LEGAL MEMORANDA FILED WITH THE TRIAL COURT, SHALL NOT BE SUBMITTED WITHOUT THE PRIOR APPROVAL OF THE CLERK. INCLUDE A TABLE OF CONTENTS LISTING EACH ATTACHMENT AND REFERRING TO SEQUENTIALLY NUMBERED PAGES. IF THE PARTIES' REQUESTS FOR FINDINGS AND RULINGS ARE ATTACHED, NOTE ON THE RIGHT SIDE OF PAGE WHETHER EACH REQUEST WAS GRANTED, DENIED, OR NOT RULED UPON [RULE 6(5)]. REGARDING THE TEST OR RELEVANT CONSTITUTIONAL, STATUTORY, AND OTHER DOCUMENTS, SEE RULE 7(6).

CERTIFICATIONS

1. **I hereby certify that every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection, or where appropriate, by a properly filed pleading.**

/s/ ____________________

Michael C. Harvell, Esq.
Sheehan Phinney Bass + Green, P.A.
1000 Elm Street, P.O. Box 3701
Manchester, NH 03105-3701
(603) 66S-0300

2. **I hereby certify that copies of this notice of appeal have been served on all parties to the case and have been filed with the clerk of the court from which appeal is taken in accordance with Rule 26(2).**

/s/ ____________________

Michael C. Harvell, Esq.
Sheehan Phinney Bass + Green, P.A.
1000 Elm Street, P.O. Box 3701
Manchester, NH 03105-3701
(603) 668-0300